felons in Marshall who have completed their imposed sentence, over 395,000 (79%) have outstanding financial obligations, and over 340,000 (68%) are indigents who could not afford legal representation even when their liberty was at stake. *Id.* Unlike *Rodriguez,* relative wealth is not implicated here. J.A. 6. While all of the *Rodriguez* plaintiffs were relatively poor, some could in fact afford to live in a different school district and enjoy a better public education. 411 U.S. at 20. The Plaintiffs here do not merely struggle to pay, or choose not to, they are simply unable to.

As a consequence of their indigency, Stoll and other Plaintiffs are absolutely deprived of the benefit of re-enfranchisement. At conviction, felons are deprived of the right to vote per Marshall state law. J.A. 6. § 67-91 creates and grants the right to vote to former felons, and it is in fact *the only avenue* to regain voting rights lost due to a felony conviction. *Id.* at 5. § 67-91. This is also a second crucial distinction from *Jones*, where indigent felons had multiple alternative avenues to re-enfranchisement. 975 F.3d at 1056. In *Jones*, indigent felons could seek executive clemency, termination of financial obligation by a payee, conversion of financial obligation to community service hours, or judicial modification of the original sentencing order. *Id.* In contrast, indigent felons in Marshall who cannot afford to pay their financial obligations are completely barred from re-enfranchisement.

Having the opportunity to enjoy voting before conviction is not an alternative avenue. The benefit at issue is re-enfranchisement, not voting. Under *Richardson v. Ramirez,* the right to vote and re-enfranchisement are inherently different as a matter of the Constitution. 418 U.S. 24, 54 (1974). Voting is a fundamental interest, whereas re-enfranchisement is not. *Id.* (explaining that § 2 of the Fourteenth Amendment affirmatively sanctions the exclusion of felons from voting). *Richardson* is settled law: no other Supreme Court precedents contradict or qualify its holding. To say the second *Rodriguez* factor is not satisfied because all felons could vote pre-conviction would

imply that re-enfranchisement equates voting. In that case, strict scrutiny still applies because the challenged statute then implicates a fundamental interest: voting. *Id*.

Because § 67-91(C)(2) satisfies both *Rodriguez* factors, the *Harper/Bearden* exception applies here. This Court should apply strict scrutiny, not rational basis review. As conceded by the state of Marshall at oral argument, § 67-91(C)(2) fails strict scrutiny. J.A. 13. § 67-91(C)(2) therefore violates Equal Protection and is unconstitutional.

II. Alternatively, § 67-91(C)(2) violates Equal Protection because it fails rational basis review.

Even applying rational basis review, § 67-91(C)(2) still violates Equal Protection. To satisfy rational basis review, a law must be rationally related to a legitimate government interest. *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). However, this highly deferential review standard is not toothless. *Schweiker v. Wilson,* 450 U.S. 221, 234 (1981). § 67-91(C)(2) fails rational basis review because there is no rational relationship between the classifications and proffered interest, for both indigent and monied, and violent and non-violent felons.

A. There is no rational relationship between indigency and responsible exercise of the franchise.

§ 67-91(C)(2) fails rational basis review because there is no rational relationship between indigency and one's inability to "responsibly exercise the franchise." The district court, again citing *Jones*, held that the state of Marshall can "rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not." J.A. 9. As an initial matter, the Court has, more than five decades ago, explicitly rejected the argument that one's ability to pay is relevant to the exercise of franchise. *Harper,* 383 U.S. at 669 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.").

Granted, perhaps there is an argument that felons who can afford to, but choose not to pay their financial obligations are less responsible voters. But that argument fails for two reasons. First, the state of Marshall can effectively preclude felons who are unwilling to pay, while including felons who are willing but unable to pay, by creating an indigency exception. The Court has more than once instructed in cases within the *Harper/Bearde*n exception, that an indigency exception would have cured the constitutional defects at issue. *Griffin*, 351 U.S. at 29; *Britt v. N.C.,* 404 U.S. 226, 228 (1971); *Gardner*, 393 U.S. at 370; *Draper*, 372 U.S. at 497-98; *Eskridge v. Wash. Prison Bd.*, 357 U.S. 214, 216 (1958).

Secondly—and more importantly—what is at issue here is the constitutionality of § 67-91(C)(2) with respect to indigent felons who simply cannot afford to pay. Rational basis must be judged with respect to those typical of the disadvantaged class. *Califano v. Jobst,* 434 U.S. 47, 55 (1977). There is no basis to believe that an indigent felon manifests a higher degree of disregard for the law than a monied felon, all else being equal. While rational basis review demands only "any reasonably conceivable state of facts that could provide a rational basis for the classification," the proffered basis necessarily, as a threshold matter, must be "reasonably conceivable." *Beach Commc'ns, Inc.,* 508 U.S. at 313. Such threshold rationality does not exist here. Granting the right to vote to monied felons while denying so to indigent felons does not rationally relate to Marshall's interest in having a responsible electorate. *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (holding that states cannot disenfranchise persons based on irrational reasons such as eye color). The state of Marshall cannot refuse felons re-enfranchisement based on the irrational reason of indigency.

B. There is no rational relationship between conviction of violent felonies and responsible exercise of the franchise.

Similarly, there is no rational relationship between the nature of convicted crimes and responsible exercise of franchise. § 67-91(C)(2) singles out violent felons for additional financial requirements while imposing none on non-violent felons. § 67-91. Upholding § 67-91(C)(2) requires this Court to recognize that non-violent felons are more responsible voters than violent felons. This is a false premise. If committing a felony reflects a disregard for the law, that is true for both violent and non-violent felonies. Non-violent felonies are nevertheless so harmful to society as to be classified as felonies. As concerned legislators pointed out, non-violent felonies such as massive fraud conspiracies can have widespread and devastating effects, "costing [the] state and its people millions." J.A. 4.

Furthermore, § 67-91(C)(2) plainly does not further Marshall's interest in having a responsible electorate. In fact, § 67-91(C)(2) prevents Marshall from achieving so. As discussed in Section I, *supra*, felons in Marshall have no reasonable way of ascertaining whether they committed violent or non-violent felonies. The lack of notice, combined with the steep price of violation, deter an overwhelming majority of felons from voting altogether. But felons deterred from voting are precisely those who, according to Marshall, make responsible voters: they have high regard for the law and would rather forego voting than risk committing voter fraud. While rational basis does not require narrow tailoring, the defects of § 67-91(C)(2) goes beyond mere overbreadth or under-inclusivity. It defeats the very purpose it sets out to accomplish. Rational basis calls for judicial deference so long as a statute achieves, to some extent, a legitimate purpose. *Beach Commc'ns, Inc.,* 508 U.S. at 313. A statute that prevents the achievement of its own purpose is *antithetical* to having a rational basis and does not warrant judicial deference by this Court.

Lastly, Marshall's interest in having an electorate it deems fit does not require the exclusion

of felons at all. Marshall's proffered interests speculates on felons' moral fitness to participate in the democratic process. But felons in Marshall do participate in the democratic process: they run for public office. J.A. 2. If felons are fit to represent the will of people in lawmaking, there is no rational speculation that justifies excluding them from voting. No rational basis proffered by Marshall can reconcile the contradiction of allowing felons to run for public office yet denying them the right to vote. There is no conceivable set of facts that could provide a rational basis for the classifications here. Judicial deference to the legislature does not counsel this Court to uphold a statute that lacks *any* reasonable basis. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

In conclusion, this Court should find § 67-91(C)(2) in violation of the Equal Protection Clause, for it impermissibly discriminates on wealth in the availability of voting rights.

Conclusion

For the aforementioned reasons, the Thirteenth Circuit's grant of summary judgment must be affirmed.

Applicant Details

First Name	**David**
Middle Initial	**B**
Last Name	**Liss**
Citizenship Status	**U. S. Citizen**
Email Address	**david_liss@law.gwu.edu**
Address	**Address** Street **1221 24th St. NW, Apt. 904** City **Washington** State/Territory **District of Columbia** Zip **20037** Country **United States**
Contact Phone Number	**7065776074**

Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2019**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 20, 2023**
Class Rank	**25%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Peterson, Todd
tpeter@law.gwu.edu
(703) 768-5813
Hydrick, Stacey
staceyhydrick@mac.com
Lerner, Renée
rlerner@law.gwu.edu
(703) 528-8155
Dickey, Ryan
dickey@law.gwu.edu
2026161509

This applicant has certified that all data entered in this profile and any application documents are true and correct.

David B. Liss

1221 24th St. NW, Apt. 904 · Washington, D.C. 20037 · (706) 577-6074 · David_liss@law.gwu.edu

June 14, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a recent graduate of The George Washington University Law School. I am writing to apply for a 2024-25 term clerkship in your chambers. I am interested in criminal law and aspire to become a federal prosecutor focusing on cybersecurity. After I take the bar exam this summer, I will serve as a judicial law clerk for The Honorable James A. Crowell IV at the Superior Court of the District of Columbia. I believe this experience will make me a desirable candidate for this position.

Enclosed please find my resume, transcript, and writing sample. The writing sample is a Report and Recommendation I wrote while serving as an intern for The Honorable M. Stephen Hyles, Magistrate Judge for the Middle District of Georgia, Columbus Division. This sample evaluates a prisoner's motion to vacate his sentence based on ineffective assistance of counsel.

If you have any questions, please feel free to contact me at the above address and telephone. Thank you for your time and for considering my application.

Respectfully,

David B. Liss

David B. Liss

David B. Liss

1221 24th St. NW, Apt. 904 | Washington, D.C. 20037 | (706) 577-6074 | David_Liss@law.gwu.edu

EDUCATION

The George Washington University Law School — Washington, D.C.
Juris Doctor, cum laude — *May 2023*

GPA:	3.63
JD Rank:	117/526 (22%)
Concentration:	National Security and Cybersecurity Law
Honors:	President's Volunteer Service Award, GW Law Pro Bono Recognition (Gold Award: 685.5 hours) Thurgood Marshall Scholar Dean's Recognition for Professional Development
Activities:	Dean's Fellow (2021-2023)

The University of Georgia — Athens, GA
Artium Baccalaureus, magna cum laude, in Classical Culture — *May 2019*
Artium Baccalaureus, magna cum laude, in International Affairs — *May 2019*

GPA:	3.75
Minor:	Italian
Study Abroad:	IES Rome: Language and Area Studies Program (Sept. 2017 – May 2018)

EXPERIENCE

Superior Court of the District of Columbia — Washington, D.C.
The Honorable James A. Crowell IV — *Sept. 2023 – Sept. 2024*
Judicial Law Clerk

- Will begin my clerkship for Judge Crowell in September 2023

United States District Court for the Middle District of Georgia, Columbus Division — Columbus, GA
The Honorable M. Stephen Hyles, Magistrate Judge — *May 2023 – June 2023*
Legal Intern

- Wrote several legal memoranda and a Report and Recommendation on a motion to vacate sentencing for ineffective assistance of counsel
- Attended court proceedings, including a criminal trial for a doctor accused of killing his patients

United States Attorney's Office for the District of Columbia, Criminal Division — Washington, D.C.
Fraud, Public Corruption, and Civil Rights Section — *Jan. 2023 – April 2023*
Legal Intern

- Aided in ongoing criminal investigations and attended court proceedings
- Researched and wrote motions for ongoing litigation, such as a response to a severance motion

U.S. Department of Justice, Criminal Division — Washington, D.C.
Computer Crimes and Intellectual Property Section — *Sept. 2022 – Dec. 2022*
Legal Intern

- Researched and drafted on issues such as the authentication of digital evidence, corporate attorney-client privilege, and the statutory requirements for the return of pre-indictment seized materials
- Attended trainings on subjects like the requirements of the Electronic Communications Privacy Act

U.S. Department of Justice, Office of the General Counsel — Falls Church, VA
Executive Office for Immigration Review — *June 2022 – Aug. 2022*
Legal Intern – Summer Law Intern Program

- Reviewed and redacted documents in response to requests through the Freedom of Information Act, conducted Initial Privacy Assessments, and reviewed attorney discipline cases from Immigration Court

Department of Homeland Security, Immigration and Customs Enforcement — Washington, D.C.
Office of the Principal Legal Advisor — *Sept. 2021- Dec. 2021*
Law Clerk

- First chaired an asylum case and wrote two appellate briefs

Immigration and Customs Enforcement, Office of the Principal Legal Advisor — Washington, D.C.
Homeland Security Investigations Law Division — *May 2021 – Aug. 2021*
Law Clerk

- Researched legal areas related to the Fourth Amendment, Cultural Property, and Asset Forfeiture

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G45768254
Date of Birth: 16-JUL

Date Issued: 01-JUN-2023

Record of: David B Liss

Page: 1

Student Level: Law
Admit Term: Fall 2020

Issued To: DAVID LISS
DAVID_LISS@LAW.GWU.EDU

REFNUM:5169509

Current College(s):Law School
Current Major(s): Law
Concentration(s): NatSecurity& CybersecurityLaw

Degree Awarded: J D 21-MAY-2023
With Honors
Major: Law
Area of Concentration: NatSecurity& CybersecurityLaw

JD RANK: 117/526

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
	Law School		
	Law		
LAW 6202	Contracts Gabaldon	4.00	B+
LAW 6206	Torts Karshtedt	4.00	B+
LAW 6212	Civil Procedure Peterson	4.00	B
LAW 6216	Fundamentals Of Lawyering I Collins	3.00	B
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.178		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.178		
Spring 2021			
	Law School		
	Law		
LAW 6208	Property Tuttle	4.00	A-
LAW 6209	Legislation And Regulation Roberts	3.00	A
LAW 6210	Criminal Law Braman	3.00	A-
LAW 6214	Constitutional Law I Fontana	3.00	B
LAW 6217	Fundamentals Of Lawyering II Collins	3.00	A-
	Ehrs 16.00 GPA-Hrs 16.00 GPA 3.604		
	CUM 31.00 GPA-Hrs 31.00 GPA 3.398		
	Good Standing		
	DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6360	Criminal Procedure Lerner	3.00	A+
LAW 6666	Research And Writing Fellow Blinkova	2.00	CR
LAW 6668	Field Placement Mccoy	2.00	CR
LAW 6671	Government Lawyering Freuden	2.00	A
LAW 6870	National Security Law Altenburg	3.00	A+
LAW 6886	Domestic Terrorism Brzozowski	2.00	A-
	Ehrs 14.00 GPA-Hrs 10.00 GPA 4.133		
	CUM 45.00 GPA-Hrs 41.00 GPA 3.577		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		
Spring 2022			
LAW 6218	Professional Responslbty/Ethic Tuttle	2.00	A-
LAW 6230	Evidence Pierce	3.00	A+
LAW 6268	Employment Law Schoenbaum	3.00	B+
LAW 6666	Research And Writing Fellow Pont	2.00	CR
LAW 6879	Cybersecurity Law And Policy Mcnicholas	2.00	B-
LAW 6884	Tech Foundations For Cybersecu Clark	1.00	CR
	Ehrs 13.00 GPA-Hrs 10.00 GPA 3.567		
	CUM 58.00 GPA-Hrs 51.00 GPA 3.575		
	Good Standing		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
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GWid : G45768254
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Record of: David B Liss

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
LAW 6369	Computer Crimes Dickey	2.00	A
LAW 6380	Constitutional Law II Fontana	3.00	A
LAW 6666	Research And Writing Fellow Pont	2.00	CR
LAW 6667	Advanced Field Placement Buatte	0.00	CR
LAW 6668	Field Placement Mccoy	4.00	CR
LAW 6683	College Of Trial Advocacy Saltzburg	3.00	A
Ehrs 14.00	GPA-Hrs 8.00	GPA 4.000	
CUM 72.00	GPA-Hrs 59.00	GPA 3.633	
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2023			
Law School			
Law			
NatSecurity& CybersecurityLaw			
LAW 6250	Corporations	4.00	B+
LAW 6497	Selected Topics In Ip Law	2.00	A
LAW 6666	Research And Writing Fellow	2.00	CR
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	2.00	CR
LAW 6893	Disinfo, Natsec, & Cybersec	2.00	A
Ehrs 12.00	GPA-Hrs 8.00	GPA 3.667	
CUM 84.00	GPA-Hrs 67.00	GPA 3.637	
Good Standing			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	84.00	67.00	243.67	3.637
OVERALL	84.00	67.00	243.67	3.637

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Katie Cloud
Interim University Registrar

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EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added: *A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit
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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write to you on behalf of David Liss, who has applied for a clerkship with you following his graduation from The George Washington University Law School in May 2023. David was a student in my small-section Civil Procedure course (40 students) during his first semester at GW Law. I have gotten to know David quite well from his frequent participation in class, conversations with him outside of class, and his participation in the Inns of Court Program, for which I am a faculty advisor in the Cardozo Inn. David has worked hard to become an exceptional law student, and I am confident that he would be an outstanding law clerk.

You can see how much David has grown as a law student by looking at his transcript. He began well, but not at the top of his class. Notwithstanding some initial uncertainty about how to make and evaluate legal arguments, David displayed a remarkable commitment to self-directed learning during his first semester in my Civil Procedure class. He responded very well to difficult Socratic questioning in class. His first semester exams showed that he was still in the process of absorbing the different analytical methods that we teach in law school. To his great credit, he sought frequent feedback and my strong belief was that he would significantly improve during his second semester. My prediction, based on my many interactions with David and his clear commitment to excel, turned out to be correct. David's GPA went from 3.2 in the first semester to 3.6 for the second semester and 4.1 for his third semester. This was not an accident but the result of David's committed efforts to apply his considerable intellect to the development of the very specific kinds of analytical skills necessary to excel as a lawyer. Some law students enter law school with these skills already well in hand. I have much more admiration for those who start out with challenges and, through their determination and grit, become the kind of brilliant legal analyst that David so clearly now has become.

David is not just an academic superstar; he also worked hard to acquire the non-cognitive skills that are so important in the legal profession. David received the Dean's Recognition for Professional Development. In order to receive this award, students must complete, on their own initiative, a variety of activities that will help them acquire the full range of skills necessary to become a successful lawyer. David understands how important it is for a young lawyer to take charge of his own professional development, and he has worked hard to become a complete lawyer. There are plenty of academically brilliant law students who fail to grasp how necessary it is to go beyond the 1L classroom to work on the non-cognitive skills that are essential in the legal workplace. David really appreciates that getting A's in the classroom is not enough, and he has the self-direction to acquire the entire complement of legal skills.

Finally, David is also a terrifically nice person. He is well regarded by the faculty and his peers. I have no doubt that he will continue to grow and develop as a young lawyer and that he will become an alumnus of whom GW Law will be exceptionally proud. I recommend him to you with the greatest enthusiasm.

Sincerely,

Todd David Peterson
Professor of Law and
Carville Dickinson Benson Research Professor
(202) 994-1004
tpeter@law.gwu.edu

SUPERIOR COURT OF DEKALB COUNTY
DEKALB COUNTY COURTHOUSE
556 N. MCDONOUGH STREET, SUITE 6240
DECATUR, GEORGIA 30030

CHAMBERS OF
STACEY K. HYDRICK

TELEPHONE (404) 371-2691
FACSIMILE (404) 371-3044
shydrick@dekalbcountyga.gov

September 22, 2022

Re: Letter of Recommendation for David Liss

To Whom It May Concern:

I am honored to recommend David Liss for a Federal Clerkship position. I have known David for the past eight years. He and my son have been friends since their freshman year of college and roommates their senior year. Just before their senior year, there was an issue with the apartment the boys leased, which David and I had to handle while my son was out of town. David was in Athens and immediately jumped in to help resolve the problem by researching the Athens/Clarke County housing code, formulating logical and well thought out legal arguments, and communicating his findings to the appropriate entities. To say I was impressed is an understatement. I wish I saw the same level of determination, commitment, and attention to detail from more of the attorneys that appear before me every day.

David is also one of the most intelligent, hardworking, and motivated young men I have met. He currently has a 3.577 GPA at The George Washington University Law School, was named a Thurgood Marshall Scholar and received the Dean's Recognition for Professional Development. He has worked with the Department of Homeland Security since May of last year and is a Dean's Fellow (teaching assistant). In addition to his studies, David knows the importance of giving back. He has volunteered for various community service organizations, including The Backpack Project, Food 2 Kids, and Relay For Life.

David is smart, determined, and is a natural leader. He demonstrates true initiative and a real desire to learn. Given his stellar academic credentials and his proven problem-solving skills, I know David will be an outstanding lawyer and a credit to any Judge who is lucky enough to work with him. If you have any questions about David or his qualifications, please contact me anytime.

Best regards,

Stacey Hydrick

The Honorable Stacey K. Hydrick
Judge, DeKalb County Superior Court

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a pleasure to recommend David Liss for a clerkship in your chambers. David is a remarkably focused and prepared student. His career goal is to be an AUSA in the DC U.S. Attorney's Office, concentrating on cybersecurity issues. He has worked out the steps that would be best to take to achieve this goal, and has correctly decided that it would be important to clerk for a judge on the DC Superior Court and a federal district judge.

I had the good fortune to teach David in my criminal procedure class in fall 2021. David immediately caught my eye with his calm, utterly prepared demeanor. He faultlessly and succinctly answered every question I asked him. He also posed questions of his own, often related to computers or cybersecurity, which were highly sophisticated and led both me and the class to a better appreciation of this important field. He also showed a deep interest and understanding of issues related to investigation of violent crime.

Given his excellent class participation, I was not surprised that he did very well on the exam. But he exceeded even my high expectations, earning an A+. His answers showed a mastery of legal doctrine and the ability to apply it to different situations. His response to a policy question was striking, again showing facility with doctrine but also a realistic appreciation for resource constraints and human motivation. He has a valuable combination of analytic ability and common sense. His writing is clear and concise.

At George Washington, David has shown himself capable of hitting the ball out of the park in multiple classes, earning a top grade of A+. He had a bit of a slow start in the first semester of his first year, which was entirely online. But he rapidly recovered and his grades are now very good. He especially enjoys classes concerning true "lawyers' law" such as criminal procedure and civil procedure. These are, of course, important in a clerkship.

Outside of class, I have greatly enjoyed speaking with David about a variety of topics. He is well-rounded and well-read. He grew up in Columbus, Georgia. As an undergraduate at the University of Georgia, he took an intense interest in classical studies, studying Latin and earning a minor in Italian. He greatly appreciates art and antiquities, and spent a year excavating archeological sites in Rome. I did not know that there was such a field as speleology, the study of caves, until he introduced me to it. Something that I find particularly engaging about him is that one of the reasons he decided to go to law school in DC was the large number of world-class museums here. He finds it incredible that he can go to a museum as superb as the National Gallery on a whim. Would that every young person had that attitude!

David is an avid guitarist, and played for a cover band in college; now he mostly plays on his own. He reads widely, including fantasy and science fiction, and more recently nonfiction and classics. Recently, he has read David Simon's Homicide, about the homicide unit of the Baltimore Police Department, and Miles Davis's autobiography. He would be a pleasure to work with and a great asset to your chambers.

Please do not hesitate to contact me if I may be of further assistance.

Very truly yours,

Renée Lettow Lerner
Donald Phillip Rothschild Research Professor of Law
George Washington University Law School
(202) 994-5776
rlerner@law.gwu.edu

U.S. Department of Justice
Criminal Division
Computer Crime and Intellectual Property Section

1301 New York Avenue NW
Washington, DC 20530
(202) 616-1509 office
Ryan.Dickey@usdoj.gov

June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

My name is Ryan Dickey, and I write to recommend David Liss—highly and without hesitation—for a clerkship with your chambers. I have had the pleasure of both supervising and teaching David, and, based on my experience, I am confident he will serve as an excellent clerk.

I supervised David during his fall 2022 internship with my office, the Computer Crime and Intellectual Property Section, which is part of the Criminal Division of the Department of Justice. During his internship, he worked directly with federal prosecutors, myself included, on legal issues across a wide range of criminal law, both substantive and procedural, with a focus on cybercrime, intellectual property, and gathering of electronic evidence.

In a ransomware investigation, David researched how a critical piece of evidence could be authenticated under the Federal Rules of Evidence in light of the relevant law of the circuit in which the case was being investigated. In an intellectual property case, he examined whether a former principal of a corporate defendant could waive the corporation's attorney–client privilege. In both matters, David produced comprehensive analyses evaluating the relevant rules, statutes, and case law, all in light of our facts. I was impressed not only with his ability to digest large bodies of evidence and case law, but also with his capacity to incorporate and learn from constructive feedback during the drafting process.

As the semester progressed, David worked on a variety of legal issues, from aiding and abetting liability to the scope of discovery during the sentencing phase of a criminal proceeding to the appropriateness of certain conditions of supervised release in a sextortion prosecution. Throughout the semester, I received universally positive feedback from my colleagues about his thoroughly researched memorandum and his ability to work expeditiously and with little oversight. Many of my colleagues, after working with David on one project, requested his help with other matters. As his internship reached its end, he was simply inundated with assignments.

In addition to interning with my office, David was also a stand-out student in my course on computer crime law at George Washington University Law School during the fall 2022 semester. He came to every class well-prepared and ready to demonstrate a comprehensive understanding of the materials, whether we were learning about substantive computer crime law, such as the Computer Fraud and Abuse Act, or privacy laws that govern the collection of electronic evidence, such as the Stored Communications Act. David not only received one of the highest grades in the course, but I was struck by his intellectual curiosity—he routinely asked thoughtful questions and actively participated in our class discussions—all while being respectful of the other students' contributions. Any chambers would be lucky to have his as a teammate.

In my experience as a former federal district court clerk and Assistant United States Attorney, I believe David possesses all the qualities of an excellent clerk and litigator: exceptional legal acumen, professionalism, the capacity to manage a high-volume caseload, and the ability to effortlessly build rapport with colleagues. I highly recommend him for a clerkship in your chambers. If there is anything I can do to help with your selection process, please do not hesitate to contact me at ryan.dickey@usdoj.gov or (202) 616-1509. Thank you.

Kind regards,
Ryan K.J. Dickey

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JEFFREY MCBRIDE,	:	
	:	
Petitioner,	:	
	:	No. 4:20-cr-20-CDL-MSH
	:	No. 4:22-cv-00188-CDL-MSH
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
_____	:	

REPORT AND RECOMMENDATION

Pending before the Court is Petitioner Jeffrey McBride's motion and amended motion to vacate his sentence pursuant to 28 U.S.C. § 2255 (ECF Nos. 77, 79). For the reasons stated below, it is recommended that McBride's motion to vacate be denied.

BACKGROUND

On July 15, 2020, a federal grand jury returned an indictment against Petitioner, charging him with possession of firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2), possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2, and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Indictment 1-3, ECF No. 1. Petitioner was arrested on August 5, 2020. Arrest Warrant 1, ECF No. 11; ECF 21. On the same day, Petitioner appeared for an initial appearance via

video conference and entered a plea of not guilty. Text-only Minute Entry, ECF No. 19; Plea Sheet 1, ECF No. 32.

On December 3, 2020, the Government filed a Superseding Information, which charged Petitioner only with one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Superseding Information, ECF No. 36. That same day, Petitioner signed a plea agreement and pled guilty to the Superseding Information. Plea Sheet, ECF No. 37; Plea Tr. 19, ECF No. 68; Plea Agreement, ECF No. 38. In doing so, Petitioner agreed that the Government could prove that on September 20, 2019, he possessed and intended to distribute methamphetamine with a net weight of 498.73 grams and a purity of 72% +/- 5%, resulting in 334.15 grams of pure methamphetamine. Plea Tr. 20-22; Plea Agreement 10. Additionally, the parties agreed that, during the search of the vehicle occupied by Petitioner, the Government uncovered a loaded handgun under the driver side floor mat. Plea Sheet; Plea Tr. 19; Plea Agreement 10.

Following Petitioner's guilty plea, the United States Probation Office ("USPO" or "Probation") prepared a pre-sentence report ("PSR") (ECF No. 47) using the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). In calculating the offense level, the USPO assigned a base level offense of 32, PSR ¶ 19, ECF No. 47, with an adjusted level of 34 due to the special offense characteristics. *Id.* ¶¶ 20, 24. After a three-level reduction for acceptance of responsibility and entering the plea in a timely manner, the final total offense level was 31. *Id.* ¶¶ 26-28. The USPO calculated a criminal history category of V and determined that Petitioner's Guidelines imprisonment range was 168-210 months. *Id.*

¶ 55. Neither party filed an objection to the PSR. PSR Addendum, ECF No. 47-1. Petitioner filed a sentencing memorandum through counsel on March 1, 2021, requesting the Court not to apply the 2-point enhancement for a firearm located in the vehicle operated by Petitioner's partner, noting that Petitioner "was arrested outside of the vehicle" and "neither had the firearm on his person nor within his reach." Sent'g Memo 1, ECF No. 48.

On March 2, 2021, the Court conducted a sentencing hearing via zoom and considered Petitioner's arguments. Sent'g Tr., ECF No. 69. Petitioner's counsel stated she was not officially objecting to the PSR in making the argument against the two-point firearm enhancement, noting it was a discretionary matter for the court. *Id.* at 6. The Court determined this was effectively an objection, *id.* at 11, and overruled it. *Id.* at 13-14. The Court sentenced Petitioner to 168 months' imprisonment, three years supervised release, and imposed a $100 mandatory assessment. Sent'g Tr. 22-23 Judgment 2-7, ECF No. 51.

On September 23, 2021, Petitioner filed a notice of appeal (ECF No. 57). On appeal, the Eleventh Circuit affirmed Petitioner's sentence due to his appeal waiver. 11th Cir. Op. 2-4, ECF No. 73. Petitioner filed a motion to vacate his sentence (ECF No. 77) pursuant to 28 U.S.C. § 2255 on November 29, 2022, and an amended motion (ECF No. 79) on January 12, 2023. After the Court granted an extension of time to respond (ECF No. 81), Respondent filed a response on February 28, 2023 (ECF No. 83). Petitioner filed his reply on March 20, 2023 (ECF No. 84). Petitioner's motion to vacate is ripe for review.

DISCUSSION

I. Motion to Vacate

Petitioner's sole ground for relief in his motion to vacate is ineffective assistance of counsel. Respondent argues Petitioner's motion should be denied because Petitioner cannot meet his burden to show counsel was ineffective. The Court agrees and recommends that Petitioner's motion be denied.

A. Ineffective Assistance of Counsel

Petitioner alleges that counsel's assistance was ineffective (1) at sentencing; (2) on direct appeal; and (3) in misadvising Petitioner to plead guilty. As explained below, Petitioner fails to demonstrate ineffective assistance of counsel.

1. Standard

"A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). A petitioner's burden when bringing an ineffective assistance claim "is not insurmountable" but "is a heavy one." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000). To prevail on a claim of ineffective assistance of counsel, a petitioner must establish, by a preponderance of the evidence, that his attorney's performance was deficient and that he was prejudiced by the inadequate performance. *Strickland*, 466 U.S. at 687; *Chandler*, 218 F.3d at 1312-13.

To establish deficient performance, a petitioner must prove their counsel's performance "was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). To show that counsel's performance was unreasonable, a petitioner must establish

that no competent counsel would have taken the action in question. *Van Poyck v. Fla. Dep't of Corrs.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (per curiam). There is a strong presumption that the challenged action constituted sound trial strategy. *Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996).

To satisfy the prejudice prong, a petitioner must show there is a reasonable probability that, but for counsel's inadequate representation, "the result of the proceeding would have been different." *Meeks v. Moore*, 216 F.3d 951, 960 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 694). If a petitioner fails to establish he was prejudiced by the alleged ineffective assistance, a court need not address the performance prong of the *Strickland* test. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

Challenges to guilty pleas based on ineffective assistance of counsel are subject to the two-part *Strickland* test. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A petitioner may only attack the "voluntary and intelligent character of the guilty plea." *Id.* at 56-57. A petitioner may establish deficient performance by demonstrating that counsel's advice was not within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). A petitioner must satisfy the prejudice prong by demonstrating that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020). Further, a petitioner must also "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *see Diveroli v. United States*, 803 F.3d 1258, 1265 (11th Cir. 2015) (affirming denial of motion

to vacate because "it would not have been rational for [the petitioner] to reject his plea bargain"). Failure to establish prejudice by the petitioner does not require the Court to address the performance prong of the *Strickland* test. *See Hill*, 474 U.S. at 59; *Holladay*, 209 F.3d at 1248.

2. Sentencing

Petitioner raises four arguments related to his sentencing. He argues counsel did not object to (1) his status as a career offender, (2) the two-level firearm enhancement, (3) the quantity of pure methamphetamine, and (4) his criminal history points. Each argument lacks merit and is addressed, in turn, below.

a. Career Offender Status

Petitioner first argues that because counsel did not object to his status as a career offender, he was prejudiced as to the length of his sentence.[1] Mot. to Vacate 6-13. Although the Government did assert at the change of plea hearing that Petitioner qualified as a career offender for purposes of sentencing, Plea Tr. 23, the USPO determined, after investigation, that Petitioner did not qualify for that status. PSR ¶ 40. The Government did not object to the PSR, nor did they object at the sentencing hearing. PSR Addendum; Sent'g Tr. 5-6. The Court agreed with the PSR and calculated Petitioner's guideline range under criminal history Category V. *See* Minute Sheet, ECF No. 49; Sent'g Tr. 22. Thus, Petitioner's argument lacks merit, because he was not sentenced as a career offender. *See id.* Counsel has no duty to raise a meritless argument. *See Strickland*, 466 U.S. at 687-91;

[1] Career offender status pursuant to U.S.S.G. §4b1.1 carries greater penalties for defendants, as their guideline range is automatically moved to the highest criminal history category of VI.

see also Denson v. United States, 804 F.3d 1339, 1342 (11th Cir. 2015). Accordingly, counsel was not ineffective as to this issue.

b. Firearm Enhancement

Petitioner next argues that, had counsel objected to the two-level firearm enhancement at sentencing, he would not have received this enhancement.[2] Mot. to Vacate 20-22; *see* U.S.S.G. §2d1.1(b)(1). Although counsel did not object to the enhancement in the PSR, she did object at the sentencing hearing. Sent'g Tr. 6. Counsel articulated several arguments as to why the enhancement should not apply and preserved the argument for appeal. *Id.* at 6-14. The District Judge overruled the objection, stating, "I'm unable to conclude that it's clearly improbable that the gun was connected to the drug offense." *Id.* at 13-14. Petitioner's argument lacks merit because counsel did, in fact, object to the enhancement. Sent'g Tr. 13-14; *see*, *e.g.*, *Cruz v. United States*, No. W-99-CR-013, 2005 WL 8159510, at *2 (W.D. Tx. Nov. 1, 2005) (denying ineffective assistance of counsel claim on failure to object because counsel did object and was overruled). Thus, counsel was not ineffective as to this issue.

c. Quantity of Actual Methamphetamine

Petitioner next argues that counsel should have objected to the PSR's calculation of actual methamphetamine because he should have been sentenced for a mixture as opposed to actual methamphetamine. Mot. to Vacate 13-20; Am. Mot. 2-4. For purposes of

[2] This enhancement applies when a defendant convicted of a drug trafficking offense is found to have possessed a dangerous weapon, *see* U.S.S.G. §2D1.1(b)(1), unless it is "clearly improbable that the weapon was connected with the offense." *Id.* at n.(11)(A). In this case, the enhancement moved Petitioner's base level offense from 29 to 31. Sent'g Tr. 13.

sentencing, methamphetamine is quantified based on purity or weight—whichever results in the greater sentence. *See* U.S.S.G. §2D1.1(c), n. B; *see also United States v. Baez Perez*, 515 F. App'x. 866, 867-68 (11th Cir. 2013) (per curiam). A quantity of actual methamphetamine between 150-500 grams results in a base offense level of 32. *See* U.S.S.G. §2D1.1(c)(4). Petitioner stipulated in the plea agreement that he possessed and intended to distribute methamphetamine with a net weight of 498.73 grams and a purity of 72% +/- 5%, resulting in 334.15 grams of actual methamphetamine. Plea Tr. 20-22; Plea Agreement 10. The PSR concluded the purity of the methamphetamine was 72%, resulting in 359.08 grams of actual methamphetamine. PSR ¶ 12. The Court used the slightly lower plea agreement number in sentencing. Sent'g Tr. 22. Regardless, both calculations are well above the threshold of 150 grams for a base offense level of 32. *See* U.S.S.G. §2D1.1(c)(4).

"When a defendant pleads guilty, his declarations under oath carry a strong presumption of truth." *Cedeno-Gonzalez v. United States*, 757 F. App'x 868, 870 (11th Cir. 2018) (per curiam) (citing *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017)). At the plea hearing, under oath, Petitioner informed the Court he had read the plea agreement and gone over it with counsel, confirmed he had signed the agreement and the attached statement, and stated he was entering into the plea freely and voluntarily. Plea Tr. 7-24. Petitioner further agreed he was completely satisfied with the advice and representation of his counsel. *Id.* at 13. Based on Petitioner's desire to plead guilty, counsel was reasonable in not objecting to the quantity of methamphetamine. *See Strickland*, 466 U.S. at 690-91.

To the extent that Petitioner asserts counsel was ineffective for not objecting to the calculation of methamphetamine, he has failed to demonstrate prejudice. *See id.* at 694. Petitioner states he wanted counsel to raise certain policy arguments against the drug weight calculation. Mot. to Vacate 13-14. Counsel could have raised these arguments in an objection, but Petitioner fails to demonstrate that there is a reasonable probability of a different or more favorable outcome if she had, given the quantity of methamphetamine met the threshold amount under any calculation. *See Meeks*, 216 F.3d at 960; *see also Borbas v. United States*, No. 1:13-CR-0025-SCJ-JFK-6, 2018 WL 5984860, at *12 (N.D. Ga. Oct. 16, 2018), *recommendation adopted*, 2018 WL 5983018, at *1-2 (N.D. Ga. Nov. 14, 2018). There is no basis for Petitioner's argument either in the Eleventh Circuit or in the Guidelines. *See generally Baez Perez*, 515 F. App'x. at 867-68. Accordingly, counsel was not ineffective as to this issue.

d. PSR Interview

Petitioner's final argument related to sentencing is that counsel's failure to appear at the PSR interview and allegedly only reviewing the PSR with him for "180-seconds" caused inaccuracies to be included in the report—namely the calculation of his criminal history points.[3] Mot. to Vacate 24. Although counsel indicated she would appear at the PSR interview and failed to appear, this was not a critical stage of the criminal proceedings where representation is ensured by the Sixth Amendment. *See*, *e.g.*, *United States v. Simpson*, 904 F.2d 607, 611 (11th Cir. 1990). Further, when asked by the Court at the

[3] Petitioner also rehashes the firearm enhancement, drug quantity, and career offender arguments in this section, but those have already been dispensed with in the preceding paragraphs.

sentencing hearing whether Petitioner had reviewed the PSR, discussed the PSR with counsel, and understood the PSR, Petitioner responded affirmatively to each question, under oath. Sent'g Tr. 5.

Petitioner alleges there were two errors in his criminal history calculation to which counsel should have objected, which would have resulted in nine criminal history points (Category IV) as opposed to twelve (Category V).[4] Mot. to Vacate 23-25. Relying on U.S.S.G. § 4A1.2(c)(1), Petitioner first asserts he should not have been assessed one point for a misdemeanor conviction for possession of marijuana and possession of drug related objects because he was not sentenced to more than one year of probation or at least 30 days' imprisonment. Mot. to Vacate 23-24. Possession of marijuana and drug related objects, however, are not crimes listed in § 4A1.2(c)(1) for which that requirement applies. Thus, he was properly assessed one point for a misdemeanor offense under U.S.S.G. §4A1.1(c). Petitioner also contends he was improperly assessed two points for committing an offense while under probation pursuant to U.S.S.G. §4A1.1(d) because his probation officer had released him from probation and informed him he had satisfied the probation portion of his sentence. Mot. to Vacate 24-25; PSR ¶ 39. The record reveals Petitioner was eleven years into a 15-year sentence, PSR ¶ 36, and five years into a 7-year sentence at the time of the offense. PSR ¶ 38. There is no evidence to support Petitioner's argument he had been released from probation. Moreover, even if the two-point addition was error, he would still have a criminal history score of ten and remain in criminal history category

[4] The Category V range in the Guidelines is 10-12 points.

V. *See* U.S.S.G. Sent'g Table. Therefore, even assuming counsel was deficient, Petitioner cannot show prejudice.

3. Direct Appeal

Petitioner raises two arguments that he believes led to the dismissal of his appeal: that counsel (1) failed to communicate with him during the appeals process, which prevented counsel from including arguments he wanted raised, and (2) raised a meritless argument. Mot. to Vacate 2-6. The record reveals Petitioner timely filed his *pro se* notice of appeal (ECF No. 57), counsel was re-appointed to represent Petitioner on direct appeal (ECF 60), counsel ordered transcripts (ECF No. 63), and counsel filed a merits brief, arguing the same issue she argued at sentencing—that the 2-level firearm enhancement did not apply. Brief of Petitioner-Appellant, *United States v. McBride*, No. 21-13290-B (11th Cir. June 30, 2022). The Eleventh Circuit dismissed the appeal because of Petitioner's knowing and voluntary appeal waiver. 11th Cir. Op. 2-4.

a. Non-communication and failure to raise certain arguments

Petitioner first alleges counsel failed to communicate with him regarding his appeal, resulting in her failure to include certain arguments that he wanted raised. Mot. to Vacate 2-6. Defendants have a right to counsel to aid in the direct appeal of their criminal conviction. *See Evitts v. Lucy*, 469 U.S. 387 (1985); *see also Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991). To prove ineffectiveness of counsel on direct appeal, the petitioner must prove "counsel's performance was deficient and that his performance prejudiced the defense." *Heath*, 941 F.2d at 1130 (citing *Strickland*, 466 U.S. at 687). To determine prejudice, the Court must perform a review of the merits of the claim to decide

whether there is a "reasonable probability of success on appeal." *See Heath*, 941 F.2d at 1132 (citing *Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990)).

Assuming, *arguendo*, that counsel's failure to communicate constitutes deficient performance, Petitioner has failed to demonstrate prejudice, because there was not a reasonable probability of success on appeal due to the valid appeal waiver. 11th Cir. Op. 2-4; *see Heath*, 941 F.2d at 1132. Petitioner argues that had counsel included his desired arguments—those with which he had issue at sentencing—the outcome of the appeal would have been different.[5] Mot. to Vacate 2-6. Irrespective of the valid appeal waiver, Petitioner cannot demonstrate his desired arguments related to the quantity of drugs and status as a career offender would have had a reasonable probability of success on appeal, as both of those arguments lack merit. *See Heath*, 941 F.2d at 1132; *see also Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990) ("Counsel cannot be labeled ineffective for failing to raise issues [on appeal] which have no merit."). Therefore, counsel was not ineffective as to this issue.

b. Raising a "meritless" argument

Petitioner's final argument related to his direct appeal is that the 38-page brief counsel filed challenging the application of the 2-level firearm enhancement was a "'meritless claim,' that even if granted, would not have gotten the petitioner any relief." Mot. to Vacate 6. This "meritless claim," however, is the same claim Petitioner believes counsel should have objected to at sentencing. Mot. to Vacate 21-24. Contrary to

[5] Here, Petitioner refers to the already discussed issues of the drug quantity and career offender status.

Petitioner's belief, had the argument been successful, he would have had a 2-level reduction in his base offense level. *See* U.S.S.G. §2D1.1(b)(1). Counsel made a valid argument that she had preserved on appeal. Therefore, counsel was not ineffective as to this issue. *See Watkins v. United States*, 887 F. Supp. 2d 833, 849 (C.D. Ill. 2012) (determining that counsel adequately presenting an available argument on appeal and ultimately losing is not grounds for ineffective assistance of counsel).

4. Advice to Plead Guilty

Petitioner's final argument is that counsel was ineffective in advising him to plead guilty and waive his right of appeal because she "misadvised [Petitioner] that he was a career offender," and she did not object when the Government alleged that he would qualify as a career offender at the change of plea hearing. Am. Mot. 4. Petitioner argues that these errors led to his guilty plea and allowed the Court to paint a negative picture of him as a career offender. *Id.* Aside from the fact that Petitioner was neither sentenced as a career offender, nor was considered a career offender by either the Court or Probation, nowhere in Petitioner's motion to vacate does he allege that he would not have pleaded guilty and would have insisted on going to trial. Am. Mot. 2-4; s*ee Hill*, 474 U.S. at 59; *see also Martin*, 949 F.3d at 667.

Further, Petitioner cannot demonstrate that it would have been rational for him to reject the plea deal under the circumstances. *See Padilla*, 559 U.S. at 372; *Diveroli*, 803 F.3d at 1265 (comparing the favorability of the plea bargain to the petitioner's sentencing exposure in the event of rejection and "near-certain conviction"). Had Petitioner elected to proceed to trial under the original indictment, he would have exposed himself to a

minimum sentence of 10 years to life under Count Three, 18 U.S.C. § 841(b)(1)(A), and a statutory mandatory minimum of 5 years as a consecutive sentence for Count Four, 18 U.S.C. §924(c)(1)(A). Indictment 2-3. The Government also notes that, if it had filed the requisite pretrial notice of qualifying convictions under 18 U.S.C. § 924(e), that would have subjected Petitioner to a statutory range of a mandatory minimum of 15 years to life imprisonment if convicted of either Counts One or Two. Resp. to Mot. to Vacate. 22, n.8; Indictment 1-2.

By pleading guilty to a single count of possession and intent to distribute methamphetamine under 21 U.S.C. § 841(b)(1)(C), Petitioner's sentencing exposure was capped at twenty-years with a guideline range of 168-210 months due to his three-level reduction for acceptance of responsibility and guilty plea. On the contrary, if he were convicted at trial of that same offense, his Guidelines range would have been 235-293 months imprisonment without the three-level reduction. Like in *Diveroli*, the record establishes that Petitioner faced overwhelming evidence of guilt that he attempted to sell methamphetamine to a law enforcement officer. *See Diveroli*, 803 F.3d at 1265. Petitioner has failed to establish prejudice; therefore, the Court recommends this claim be denied. *See Hill*, 474 U.S. at 59.

II. Certificate of Appealability

Rule 11(a) of Rules Governing Section 2255 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue only if the applicant makes "a substantial showing of the denial of a constitutional

right." 28 U.S.C. § 2253(c)(2). If a court denies a collateral motion on the merits, this standard requires a petitioner to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a court denies a collateral motion on procedural grounds, this standard requires a petitioner to demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478. Petitioner cannot meet either of these standards and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the foregoing reasons, it is recommended that Petitioner's motion and amended to vacate his sentence (ECF Nos. 77, 79) under 28 U.S.C. § 2255 be **DENIED**. Additionally, a certificate of appealability should be denied. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The district judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual

and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 5th day of June, 2023.

/s/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE

Applicant Details

First Name	**Zeming**
Last Name	**Liu**
Citizenship Status	**U. S. Citizen**
Email Address	**zl2639@columbia.edu**
Address	**Address** Street **10 City Pt, Apt 41N** City **Brooklyn** State/Territory **New York** Zip **11201** Country **United States**
Contact Phone Number	**8562296666**

Applicant Education

BA/BS From	**Middlebury College**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Transnational Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Liebman, Benjamin
bl2075@columbia.edu
212-854-0678

Ponsa-Kraus, Christina
cdb2124@columbia.edu
212 - 854 - 0722

Bulman-Pozen, Jessica
jbulma@law.columbia.edu
212-854-1028

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zeming Liu
10 City Point, Apt 41N
Brooklyn, NY 11201
(856) 229-6666
zl2639@columbia.edu

June 11, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at Columbia Law School, and I write to apply for a clerkship in your chambers beginning in Aug 05, 2024.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Jessica Bulman-Pozen (212 854-1028, jbulma@law.columbia.edu); Benjamin L. Liebman (212 854-0678, bliebm@law.columbia.edu), and Christina D. Ponsa-Kraus (212 854-6579, cponsa@law.columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Zeming Liu

ZEMING LIU
10 City Point, Apt 41N, Brooklyn, NY 11201 • (856) 229-6666 • zl2639@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D., expected May 2024
Honors: James Kent Scholar (2022/2023)
Harlan Fiske Stone Scholar (2021/2022)
Activities: *Columbia Journal of Transnational Law*, Financial & Technical Editor
Constitutional Law Teaching Fellow for Professor Christina Ponsa-Kraus
Research Assistant for Professor Madhav Khosla
Law and Political Economy Society, Treasurer
Society for Chinese Law, Cultural Chair
Publication: Note, *Integrating the "Socialist Core Values" into Legal Judgments: China's New Model of Authoritarian Legality*, Colum. J. Transnat'l L. (forthcoming) (Outstanding Note Award)

Tufts University, Medford, MA
M.A. in Philosophy, received August 2021
Activities: Ethics Bowl
Thesis: "How Words of Others Independently Constitute My Reasons for Action"

Middlebury College, Middlebury, VT
B.A., *summa cum laude*, received May 2019
Majors: Philosophy (with Honors), Political Science
Activities: Symposium Global, Philosophy Club
Thesis: "Self-Representation and First-Person Authority: A Kantian Explanation of Immunity of Error through Misidentification"

EXPERIENCE

United States Attorney's Office for the Southern District of New York, New York, NY — Fall 2023 (expected)
Legal Extern

Weil, Gotshal & Manges LLP, New York, NY — Summer 2023
Summer Associate
Rotate between the Litigation Department and the Restructuring Department.

Columbia Law School, New York, NY
Research Assistant — January 2022 – present
Conducted research with Professor Benjamin Liebman on judicial transparency in China, extraterritorial applicability of Chinese law, China's litigation reduction strategy, and its official legal ideology. Reviewed court decisions and executive documents. Wrote memos.

National Center for Law and Economic Justice, New York, NY
Legal Intern — Summer 2022
Assisted with impact litigations and policy advocacy promoting economic and racial justice. Conducted legal research on civil and administrative procedures. Reviewed documents for the discovery. Designed and conducted client interviews. Drafted Title VI complaint.

Tufts University, Department of Philosophy, Medford, MA
Teaching Assistant — September 2019 – May 2021
Assisted professors in teaching undergraduate philosophy courses. Led review sessions and discussions. Graded written works with detailed commentaries. Held weekly office hours. Mentored students' writings.

LANGUAGES: Mandarin (native), German (proficient)
INTERESTS: Classical music, European literature, soccer, basketball, hiking

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/08/2023 02:51:47

Program: Juris Doctor

Zeming Liu

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L0009-1	Columbia Law/N.Y.U. Law Exchange		3.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	B+
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L8866-1	S. Contemporary Critical Thought II	Harcourt, Bernard E.	2.0	A-
L9128-1	S. Law and Authoritarianism [Minor Writing Credit - Earned]	Khosla, Madhav; Liebman, Benjamin L.	2.0	A
L6683-1	Supervised Research Paper	Liebman, Benjamin L.	1.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Goshen, Zohar	4.0	A-
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6675-1	Major Writing Credit	Liebman, Benjamin L.	0.0	CR
L8866-1	S. Contemporary Critical Thought I	Harcourt, Bernard E.	1.0	A-
L9464-1	S. Democracy's Futures	Ahmed, Ashraf; Benhabib, Seyla	1.0	A
L6683-1	Supervised Research Paper	Liebman, Benjamin L.	2.0	A
L6822-1	Teaching Fellows	Ponsa-Kraus, Christina D.	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B
L6679-1	Foundation Year Moot Court		0.0	CR
L6271-1	Law and Legal Institutions in China	Liebman, Benjamin L.	3.0	A
L6121-12	Legal Practice Workshop II	McCamphill, Amy L.	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B+
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	A
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-12	Legal Practice Workshop I	McCamphill, Amy L.; Yoon, Nam Jin	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 62.0

Total Earned JD Program Points: 62.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in very strong support of Zeming Liu's application for a clerkship in your chambers. Zeming has a truly extraordinary intellect and will make a great clerk.

I have gotten to know Zeming in a range of contexts – student, research assistant, and more recently co-author of a piece we are writing together about recent developments in legal theory in China. Zeming is in the top five percent of students I have taught over twenty-one years at Columbia; intellectually I would put him among a handful of my very top students.

Zeming's journey to law school, and to the United States, has been non-traditional. Zeming started college at Fudan University in China, one of China's best schools. But he found the limited space for free thought to be constraining and thus started looking for options to continue his studies in the U.S. He wound up at Middle-bury. Needless to say, the shift from life in Shanghai to small-town Vermont was a shock and far from easy. But Zeming excelled at Middlebury before deciding to pursue graduate work in philosophy at Tufts. His inter-est in moral and political philosophy led him to pursue a law degree rather than a Ph.D. in philosophy.

Zeming has a long-term interest in an academic career in the U.S. (he recently became a U.S. citizen). But he is still early in his legal career, and I could also see him becoming engaged in a career in practice as well. Unlike most students, Zeming is well-aware that he is still early in his legal career and is not in a rush. He is open-minded and wants to develop a range of experiences before committing to academia. Zeming has a deep intel-lectual interest in the law; he is unusual in the degree to which he seeks to understand every legal issue he confronts. He has developed a deep love of legal argument and sees law as a series of puzzles to work through. Zeming works incredibly hard at everything he does. In particular, he has worked very hard since coming to the U.S. to become a good writer in English. He now writes both insightfully and fluently, something rare for someone who only came to the US in college.

Zeming is wonderful to talk with about almost any subject. He knows a vast amount about a huge range of topics, from Kantian philosophy to the latest political gossip from China to (European) football. He has a keen critical eye; this is one reason I have enjoyed working with him so much (he is not afraid to tell me when he does not think much of one of my arguments).

Zeming's grades in law school are good, with the exception of the spring of his One L year. That was an incred-ibly stressful semester for Zeming and many of our students with family in China, as they watched from afar as family and friends struggled with the extensive lockdowns and resulting food shortages, in particular in Shang-hai. I had a number of students from China in my class that semester, including Zeming, so I know first-hand how hard it was for them to stay focused while their families and friends suffered. More recently, Zeming was one of the two best students in a seminar I co-taught during his 2L year on law in authoritarian systems.

In sum, Zeming will be a wonderful clerk. He is thoughtful and respectful and will be a great team player. Please do not hesitate to reach out if I can provide any additional information.

Sincerely,

Benjamin L. Liebman

Benjamin Liebman - bl2075@columbia.edu - 212-854-0678

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my great pleasure to write a letter of recommendation in support of Zeming Liu's application for a clerkship in your chambers. Zeming took my Constitutional Law course in the Fall 2021 semester and served as a Teaching Assistant for the same course in the Fall 2022 semester. As that trajectory suggests, I was favorably impressed with his academic perfor-mance and his personality in the 1L course. As a TA, my impression of Zeming only grew more favorable. I enthusiastically recommend him to you.

Zeming immigrated to the United States from China at the age of 20, completing his B.A. at Middlebury College and M.A. at Tufts University in Philosophy. Despite the challeng-es that such a transition would pose, Zeming earned summa cum laude honors at Middlebury. Having taught him Constitutional Law, I am not surprised at his top-notch performance at Middlebury. Zeming's passion and talent for intellectual challenges was plainly evident in his participation in my Constitutional Law course. He spoke up regularly, and his comments and questions revealed a curious and sharp analytical mind. Zeming's superb performance in the course, both orally and on the exam, earned him an A as a final grade and led me to offer him a TA position for the following year, which he accepted. My TAs attend classes, answer student questions, and conduct regular review sessions. In addition, I meet regularly with them to discuss course materials, questions the students have raised, and other course-related issues. This particular year, I also held several additional (optional) meetings with my TAs, which Zeming attended, to brainstorm for a Constitutional Law casebook I'm working on. Zeming was a valuable participant in every conversation, consistently offering smart and in-teresting observations and suggestions. He was also a very welcome presence: his agreeable personality, unfailingly positive attitude and sense of humor complement his intellectual ri-gor.

As you evaluate his application, please know that the second semester of Zeming's first year brought unusual stress, as his partner and many close friends in Shanghai suffered severely from the effects of Omicron-related shutdowns. That stress negatively affected Zem-ing's grades in the Spring 2022 semester. I would urge you to consider those circumstances in evaluating Zeming's academic performance. His much stronger grades in the prior and sub-sequent semesters much better reflect his intelligence, capacity, and work ethic.

Zeming has a real passion for law, and in particular for the theoretical and analytical challenges it poses. He is smart and responsible. And he is very likeable. I am confident he would make an excellent law clerk and a welcome addition to any judge's chambers. I rec-ommend him without reservation.

Regards,

Christina Ponsa- Kraus
George Welwood Murray Professor of Legal History

Christina Ponsa-Kraus - cdb2124@columbia.edu - 212 - 854 - 0722

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Zeming Liu for a clerkship in your chambers. Zeming is an exceptionally bright Columbia Law School student who completed an M.A. in philosophy before matriculating. He welcomes challenges; balances rigorous and precise analysis with attention to normative and theoretical questions; and brings a delightful sense of intellectual play, curiosity, and enthusiasm to his legal work. I believe he will be an excellent law clerk and recommend him to you highly.

I got to know Zeming in the fall of 2022 when he enrolled in my Legislation and Regulation course. Zeming stood out to me throughout the semester for his perceptive and enthusiastic class participation. He was always meticulously prepared for cold calls and had an impressive understanding of cases and legal rules, and he enriched our open discussions. For example, during a class discussion of I*NS v. Chadha*, Zeming highlighted tensions between formalism and functionalism in separation of powers theory and offered a critique of the Court's decision insofar as it undermined congressional capacity to control agency decision-making even as the Court's own nondelegation doctrine emphasized the importance of congressional policymaking. Several times during the semester, classmates remarked that they found Zeming's class contributions intellectually invigorating.

Given his excellent participation throughout the term, I was not surprised that Zeming wrote an excellent final exam. He offered a lucid analysis of issues ranging from the use of linguistic canons in statutory interpretation, to exceptions to the APA's notice-and-comment rulemaking requirements, to *Chevron* deference in the age of major questions. His answers were smart, careful, and creative.

Over the course of the semester, I also had the pleasure of talking with Zeming outside of class. He again offered rigorous dissections of doctrine, as well as deep and genuine engagement with the theoretical underpinnings of rules. It was a delight to watch him put together ideas from different parts of the course as well as other legal subjects. Zeming's philosophical training was also evident in these conversations. After majoring in philosophy as an undergraduate at Middlebury College—and graduating *summa cum laude* despite having immigrated to the United States at age 19—Zeming earned an M.A. in philosophy at Tufts University. He came to law school to connect his interest in moral and political philosophy to concrete social and policy issues, and he has seized opportunities to do so, both in his coursework and through extracurricular pursuits including work for the *Columbia Journal of Transnational Law*, the Law and Political Economy Society, and the Society for Chinese Law.

Let me add a brief note about Zeming's writing. Zeming was born and raised in China and, as noted above, arrived in the U.S. during his college years. Although he is fluent in English, his writing bears traces of someone who has lived in an English-speaking environment for less than a decade. I hope this will not deter you from hiring him: he has a truly exceptional mind, and I am confident he will apply his excellent work ethic to continually refining his legal writing as well as further developing other legal skills.

In sum, I believe Zeming would be an asset to any judicial chambers. In addition to his copious talents, he demonstrates concern for others, engages respectfully and considerately with everyone he encounters, and has an upbeat and friendly demeanor. If I can be of any further assistance as you consider his application, please do not hesitate to contact me.

Sincerely yours,

Jessica Bulman-Pozen

Jessica Bulman-Pozen - jbulma@law.columbia.edu - 212-854-1028

ZEMING LIU
Columbia Law School, J.D. 2024
(856) 229-6666
zl2639@columbia.edu

Clerkship Application Writing Sample

This writing sample is based on a memorandum from my 2022 summer internship at the National Center for Law and Economic Justice, a nonprofit public interest litigation group that regularly handles plaintiff-side class action lawsuits. The attorneys asked me to analyze the interpretations of the landmark Supreme Court decision *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) by different circuits. This writing sample has not been edited by others.

From: Zeming Liu
To: National Center for Law and Economic Justice
Re: Seventh Circuit Treatment of the Commonality Requirement in Employment Discrimination Class Actions After *Wal-Mart*

This memorandum focuses on the Seventh Circuit interpretation of the landmark Supreme Court decision *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), with respect to the commonality requirement for class certification under Federal Rule of Civil Procedure 23(c)(4) in employment discrimination lawsuits. In *Wal-Mart*, the plaintiffs, composed of approximately 1.5 million current and former Wal-Mart employees, alleged that the discretion exercised by their local supervisors over payments and promotion violated Title VII by incurring a disparate impact against women. Heightening the commonality requirement, the Supreme Court vacated class certification on the ground that there is no common contention "of such a nature that it is capable of class-wide resolution —which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. At the core of the opinion is that the plaintiffs failed to establish "common injury" – in this case, a disparate-impact Title VII injury – due to an absence of a showing that the employer had operated under a general discriminatory policy. Instead, decisions regarding payment and promotion decisions were within local managers' board discretion, exercised in a highly subjective manner. Under such circumstances, the requirements for class certification would not be satisfied even if the plaintiffs had established that the payment or promotion patterns differed significantly from nationwide or region-wide figures. *Id.*

The *Wal-Mart* decision was initially regarded as a heavy blow to plaintiff-side litigation alleging disparate impact, as it appeared to suggest that delegation of authority to local managers can single-handedly shield large-scale companies from class action lawsuits arising out of issues subject to local managers' independent discretion. Interpreted this way, the decision would

effectively deny the possibility of a significant portion of class actions alleging systematic discrimination on the local level. Considering the difficulty of proceeding through individual litigations rather than collectively, *Wal-Mart* seemed to be foreshadowing some major policy consequences on issues such as workplace discrimination. Indeed, some commentators even described Wal-Mart as the "death knell" of employment class actions. *See e.g.*, John C. Coffee, Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, U.S. L. WK., July 19, 2011, at 52. Yet post-*Wal-Mart* doctrinal developments suggest that the Seventh Circuit has managed to narrow down the seemingly sweeping holding in *Wal-Mart* and maintain a pragmatic standard that leaves significant space for class certification in employment discrimination lawsuits. As a result, even though *Wal-Mart* did place a higher burden on the plaintiffs seeking class certification, it failed to become a major game changer, particularly within the 7th Circuit.

A. Delegating Authority to Local Managers Does Not Itself Preclude Class Certification in the Seventh Circuit.

The key message conveyed by the Seventh Circuit is that delegation of discretionary power to local-level supervisors does not constitute a *per se* barrier against class certification, even after the *Wal-Mart* decision. *McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing the district court's denial of class certification for a group of employee-plaintiffs alleging racial discrimination in violation of Title VII under the disparate impact theory); *Bell v PNC Bank, N.A.*, 800 F.3d 360, 375 (7th Cir. 2015) (holding that the commonality requirement is satisfied if plaintiffs can show that discrimination has to do with broader company-wide policy, and not merely due to discretion exercised by local supervisors); *Ross v Gossett*, 33 F.4th 433 (7th Cir. 2022) (allowing class certification as long as the existence of a common policy is shown, regardless of whether the uniform policy reflects the visions

alleged by the plaintiffs). The cases generally interpret *Wal-Mart* as standing for the requirement that *some* organization-wide policy is necessary for class certification. For example, in *Ross*, the court notes that the contested issue in *Wal-Mart* is "the existence of *any* uniform policy." *Ross*, 33 F.4th at 438. According to the majority, the basic rationale of the *Wal-Mart* decision is that a mere theory alleging "corporate culture" that permits bias against women to infest the discretionary decisionmaking of individual local managers, absent any evidence of *affirmative* company-wide policy, cannot meet the commonality requirement. *Id.* In other words, the commonality requirement demands "some glue" holding together the alleged reasons for all those decisions by local managers. *Id.*; *Bell*, 800 F.3d at 375. Accordingly, delegation of authority itself in no way poses any obstacle. A showing of uniform policy may satisfy the requirement even in a company that delegates significant discretionary authority to local managers.

The question, then, is what kinds of showing would suffice. The landmark decision *McReynolds* provided important clarification and effectively established a flexible standard. In that case, 700 African American brokers who worked for the defendant employer, Merrill Lynch, filed a class action that charged the company with racial discrimination in employment in violation of Title VII of the Civil Rights Act. *McReynolds*, 672 F3d, at 483. Their theory was that two policies that were meant to govern the discretion of local managers led to disparate racial impact. *Id.* at 489. One was a "teaming" policy that permitted brokers in the same office to form teams whose members shared clients, and the other was an "account distribution" policy under which the company would distribute the accounts of a departing broker to competing brokers with the best records. *Id.* The plaintiffs alleged that as a result, African American brokers found it difficult to join teams predominantly composed of white brokers, which were associated

with higher revenue and more clients. *Id.* Since African American brokers failed to generate as much revenue or attract as many clients as white brokers did, they also suffered from disproportionate account distributions. *Id.* at 490.

What made the facts of this case interesting is their similarity with *Wal-Mart*: Merrill Lynch delegated significant discretion to 135 "Complex Directors" who were able to veto teams and supplement the company criteria for distributions. *Id.* In other words, the final decisions directly influencing team formations and account distributions were within the discretionary authority of local managers. Indeed, the court noted that the case is similar to *Wal-Mart* "to the extent that these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise." *Id.* If *Wal-Mart* implies that disparate impact directly caused by local-level discretion cannot establish common injury in such scenarios, it seems that class certification should be denied here as well.

The trial court indeed denied class certification, but the 7th Circuit reversed, noting that "the district judge exaggerated the impact on the feasibility and desirability of class action treatment of the fact that the exercise of discretion at the local level is undoubtedly a factor in the differential success of brokers, even if not a factor that overwhelms the effect of the corporate policies on teaming and on account distributions." *Id.* at 491. Writing for the majority, Judge Richard Posner held that plaintiffs only need to show that some company-wide policy has contributed to the disparate impact, even though it is not a predominant or significant factor. He distinguished the case from *Wal-Mart* by pointing to the existence of company-wide policies that had allegedly exacerbated disparate impact: the "teaming" policy and the "account distribution policy." These policies might not be the sole factor that caused the disparate impact: Hypothetically, there might still be severe racial discrimination by individual brokers and local

managers even without the company-wide "teaming" policy and "account distribution policy." *Id.* If those policies had not existed at all, the scenario would have been legally indistinguishable from the situation in *Wal-Mart*, and no class certification would have been granted. *Id.* However, as long as the presence of some company-wide policy has allegedly aggravated discrimination, this *incremental* discriminatory effect could serve as the basis for common injury suitable for class-wide adjudication. *Id.* Furthermore, class certification should be granted in this case even though there was no indication that the corporate level of Merrill Lynch had any *intent* to discriminate against African American brokers. *Id.* at 490. Such a question is irrelevant to the disparate impact analysis under Title VII.

B. The Commonality Requirement provided by *McReynolds* Is a Flexible One Based on Concerns for Judicial Economy.

At the heart of Judge Posner's opinion is an economic inquiry into whether the issue will be more effectively addressed on a class-wide basis. As he noted, the granting of class certification was not to suggest that there existed racial discrimination at any level of the company, or that the alleged policies indeed had a racial effect. *Id.* Rather, the point is that solving an array of individual cases in a single proceeding would be more efficient if there exists a uniform policy that is allegedly responsible for *some* personal injuries in each of those cases. The key factor for determining class certification is "whether the accuracy of the resolution would be unlikely to be enhanced by repeated proceedings." *Id.* at 483. If not, then judicial economy demands that the injuries be solved on a class-action basis.

Notably, this approach was consistent with the approach the Seventh Circuit had taken prior to the *Wal-Mart* decision. As the majority quoted from a 2003 decision, "class action treatment is appropriate and is permitted by Rule 23 when the judicial economy form

consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury." *Mejdrech v. Met-Coil Systems Corp*., 319 F.3d 910, 911 (7th Cir. 2003), cited by *McReynolds*, 672 F3d, at 491. The danger of class action proceedings, according to the majority, is that "resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury." *Id.* at 492. But if the remedy sought is injunctive relief rather than pecuniary relief, the determination of liability itself would not be adversely affected to any significant degree. *Id.*; *see also Butler v Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.").

The requirement imposed by *McReynolds* is ultimately a flexible one. A class is likely to be certified in an employment discrimination case insofar as the plaintiffs can point to a uniform policy that has causally led to some identifiable disparate impact they collectively suffer, even though that impact is an incremental one. This central holding of *McReynolds* was further affirmed in *Chicago Teachers Union, Local No. 1 v Bd. Of Educ. Of Chicago*, 797 F3d 426, 436 (7th Cir 2015) (granting class certification to a class of African American teachers and a union who alleged that the Board of Education's decision to reconstitute 10 schools – that is, to replace a school's entire staff – led to disparate impact against African American teachers and staff members). In *Chicago Teachers Union*, the process of identifying schools for reconstitution had three steps: First, the Chicago Public Schools CEO identified all schools eligible by law for reconstitution due to bad performances. *Id.* at 436. Second, the CEO narrowed down the list by

removing schools that met another objective criterion. *Id.* The third step is a subjective one: "the CEO and other high-level board members attended a series of meetings in which they discussed the types of information that the group would consider concerning schools eligible for reconstitution, and then analyzed that information." *Id.* At the end of the process, the CEO made final recommendations to the Board, all of which are accepted. The Board argued that class certification should not be granted because of the existence of the third step that involved subjective, discretionary decisionmaking. *Id.* at 435.

The court rejected the argument, holding that the first two objective steps constitute uniform policies sufficient to establish commonality: "The objective criteria in the first two steps narrowed the pool in such a way as to have a disparate impact on African American teachers." *Id.* at 436. In reaching this conclusion, the majority invoked *McReynolds* and construed it as standing for the proposition that "a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion—at least where the class at issue is affected in a common manner, such as where there is a uniform policy or process applied to all." *Id.* at 438. According to the majority, the case was sufficiently similar to *McReynolds*: both involved discretionary decisionmaking tied to some company-wide practice – the uniform "teaming" and "account distribution" policies in *McReynolds* and the objective criteria regarding school reconstitution in *Chicago Teachers Union*. As long as such discretionary decisionmaking affected the class in a common manner because of such uniform practice, the commonality requirement is satisfied. *Id.* Largely consistent with the spirit of *McReynolds*, *Chicago Teachers Union* again demonstrated the flexibility of the Seventh Circuit's approach to the commonality requirement even after the seemingly harsh *Wal-Mart* decision.

C. *Wal-Mart* Still Poses Important Limits on the Eligibility of Class Certification.

It is important to note that *McReynolds* does not indicate that the existence of *any* uniform policy would meet the commonality requirement in the employment discrimination context. The mere "uniform policy" of delegating authority to local supervisors, for example, is insufficient. The Seventh Circuit made important clarification in *Bolden v Walsh Constr. Co*., 688 F3d 893 (7th Cir 2012] (holding that class certification was inappropriate because the plaintiffs' experiences differed so significantly that the case was more in line with *Wal-Mart* than *McReynolds*). In *Bolden*, 12 African American plaintiffs alleged that the defendant, the Walsh Construction Company, practiced or tolerated racial discrimination in assigning overtime work and work conditions. *Id.* at 894-95. The district court granted class certification, and the Seventh Circuit reversed. Relying on *McReynolds*, the plaintiffs argued that the fact that the company had a uniform policy of granting discretion to superintendents, together with the allegation that those superintendents' decisions had a disparate impact, justified class treatment.

The court rejected this argument, noting that the sites all had different superintendents, different policies, and different working conditions, and that the plaintiffs consequently had distinct experiences. *Id.* at 897-898. The bare existence of a company-wide policy of delegating authority to superintendents, without more substantive guidance, was insufficient for establishing commonality. *See also Bell*, 800 F.3d, at 376 ("Cases in which low-level managers use their given discretion to make individual decisions without guidance form and overarching company policy do not satisfy commonality because the evidence varies from plaintiff to plaintiff."). Importantly, the court clarified that the economic rationale in *McReynolds* does not replace the requirement that there must be a common issue at stake and emphasized that the essential focus of *Wal-Mart* is still commonality rather than manageability. *Id.* at 898. In other words, a showing

that a class action lawsuit would be manageable does not automatically make class certification proper.

How to square *McReynolds* with *Bolden*? Although the court did not specify a categorical standard as to what kind of uniform policy would satisfy the commonality requirement, our analysis of *McReynolds* and other cases does give us some clues. In the employment discrimination context, it seems the court requires a proximate causal link between the substantive content of the company-wide policy itself and the alleged discriminatory impact. For example, in *McReynolds*, the uniform "teaming" policy and "account distribution" policy altogether proximately produced some disparate racial impact – that is, the fact that African American brokers were not able to gain equal access to good sources of revenue, clients, and redistributed accounts. Not only the discriminatory impact would not have been caused but for the policies in *McReynolds*, but such impact also bore a sufficiently characteristic relationship with the policy itself. In other words, the uniform policies identified by the plaintiffs could help judges and jurors to make intelligible the patterns of the discriminatory impact to the extent that it would be intellectually productive to resolve different plaintiffs' cases in a single proceeding. In contrast, even though the mere "uniform policy" of delegation *enabled* the local-level managers to make discretionary decisions ultimately led to the alleged discriminatory impact in *Bolden*, the causal link was still not proximate enough to the extent that the patterns of discrimination could be made intelligible by such policy. Local managers did not exercise their discretion in a common way, and different plaintiffs shared different patterns of harm under different circumstances. *Bolden* 688 F3d, at 897-898. Therefore, the "uniform policy" itself could hardly contribute anything to people's understanding of the disparate impact. This is also the case for *Wal-Mart*: the harms of different plaintiffs vary so significantly that no single

common issue could ground those different cases. Under this kind of circumstance, a class action proceeding would be neither feasible nor intelligible.

The standard set forth by *McReynolds* and developed by subsequent cases thus left ample room for plaintiff-side class action litigation over employment discrimination and other like cases within the 7th Circuit jurisdiction even after *Wal-Mart*. As it turned out, the existence of delegation of discretionary decisionmaking authority to local-level managers or superintendents does not itself pose an obstacle against class certification for employment discrimination actions under Title VII. Numerous cases have shown that even though such delegation does exist, the plaintiffs can satisfy the commonality requirement by a showing that there exists some company-wide, uniform policy allegedly responsible for some disparate impact. In other words, class certification is proper if local managers exercise their discretion in a common way attributable to a uniform policy. As long as the link between the uniform policy and the disparate impact is sufficiently proximate so that an intelligible common ground to solve different plaintiffs' claims exist, it would be feasible for the court to solve the legal claims based on the identified disparate impact in a single class action proceeding.

Finally, even though this memo only discusses the 7th Circuit treatment of *Wal-Mart*, it must be noted that this particular treatment has been influential beyond the circuit border. The Fourth Circuit, for example, heavily relied on *McReynolds* and *Bolden* in holding that the district court erred in denying class certification because it "failed to consider whether in light of the discretion alleged, the discretion was exercised in a common way under some common direction, or despite the discretion alleged, another company-wide policy of discrimination was also alleged, and whether the discretionary authority at issue was exercised by high-level managers." *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 108 (4th Cir. 2013). As such, the 7th Circuit

interpretation might help class action litigations alleging employment discrimination to proceed in other federal courts as well.

Applicant Details

First Name	**Maria**
Last Name	**Lozonschi**
Citizenship Status	**U. S. Citizen**
Email Address	**mlozonschi@law.stetson.edu**
Address	**Address** Street **114 Martinique Ave** City **Tampa** State/Territory **Florida** Zip **33606**
Contact Phone Number	**6083549025**

Applicant Education

BA/BS From	**University of California-Irvine**
Date of BA/BS	**June 2019**
JD/LLB From	**Stetson University College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp**
Date of JD/LLB	**May 18, 2024**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**Stetson Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Philip C. Jessup International Law Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Mullins, Anne
amullins@law.stetson.edu
5042582285
Podgor, Ellen
epodgor@law.stetson.edu
727-562-7348
Rozelle, Susan
srozelle@law.stetson.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Maria Lozonschi
114 Martinique Ave
Tampa, Florida 33606
(608) 354-9025

May 13, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman
600 Grandby Street
Norfolk, VA 23510

Dear Judge Walker:

I was eight years old when my grandmother took me to my first courthouse: the Palace of Justice in Iași, Romania. Having parents who lived through the Romanian communist regime instilled in me from an early age discipline, determination, and the importance of democracy, which have become the cornerstone of my character. For almost two decades this discipline was evidenced in my dedication to the arts and ballet. Today, this determination is seen in my passion for the law, which I hope can be furthered by having the privilege of serving as a 2024 term law clerk in your chambers.

My strong writing skills have been demonstrated through my work with the *Stetson Law Review* where I now serve as Notes and Comments Editor, receiving the Highest Grade Designation in my first-year Research and Writing I class, and my experience on the Moot Court Board, which has sharpened my critical thinking and analytical skills. Winning first place in Stetson Law's 1L Mock Trial Competition and second place brief in the Washington D.C. region for the Philip C. Jessup Moot Court Competition show my ability to decipher complex legal issues and succinctly communicate. I further honed my writing abilities at The Market Project, a non-profit assisting in the rehabilitation and employment for survivors of humanitarian crimes, where I learned to write on emergent issues. My writing was additionally fortified by serving as a federal judicial intern for Judge Julie S. Sneed, who exposed me to the internal operations of a federal court with its accompanying research and writing in a judicial setting.

Amidst my law school commitments, I have also had the privilege of working part-time at GrayRobinson, which has taught me to be efficient in handling multiple time-sensitive projects in a timely manner. Ultimately, what qualifies me for this position is the maturity, adaptability, and fierce determination I demonstrated by moving across the United States and abroad, learning multiple languages, and overall overcoming cultural, linguistic, and geographic barriers since I was young.

I have enclosed my resume, transcript, and writing sample. In addition, letters of recommendation from three of my professors, Anne E. Mullins, Ellen S. Podgor, and Susan D. Rozelle, will be sent under separate cover. Thank you for your time and consideration of my qualifications.

Respectfully,

Maria Lozonschi

Maria Lozonschi

114 Martinique Ave | Tampa, FL 33606 | mlozonschi@law.stetson.edu | 608-354-9025

Education

Stetson University College of Law, Gulfport, FL
Candidate for Juris Doctor — May 2024
GPA: 3.310 Rank: 73/276 (Top 26.4%)
Honors: Honor Roll (Fall 2021 & Fall 2022)
Highest Grade Designation in Research & Writing I (Fall 2021)
1st Place, 2022 1L Mock Trial Competition
Honorable Mention Appellate Advocate, Research & Writing II Section 2
2nd Place Brief & Quarterfinalist (Ranked 7/30), 2023 Philip C. Jessup Regional Competition

Activities: *Stetson Law Review*, Notes & Comments Editor Elect
Moot Court Board, Member
Phi Delta Phi Legal Honor Society, Historian

University of California – Irvine, Irvine, CA
Bachelor of Arts, International Studies — June 2019
GPA: 3.347
Honors: Dean's Honor List (2016 & 2018)
Activities: Delta Delta Delta Sorority
I Never Stand Alone "INSA" Dance Team

Experience Highlights

GrayRobinson, Tampa, FL
Part-Time Law Clerk — January 2023 – Present

- Analyzing federal, state, and local regulations to advise businesses within food and beverage industry.
- Conducting due diligence and drafting final reports by reviewing zoning municipal codes.
- Assisting in civil litigation by researching and preparing documents for serving evasive defendant.

United States District Court for the Middle District of Florida, Tampa, FL
Intern for Honorable Julie S. Sneed, Magistrate Judge — May 2022 – July 2022

- Drafted order and memorandum on a social security order and writ of execution on foreign judgment.
- Updated government request standards for evidentiary collection for Judge Sneed.
- Observed federal and state court proceedings.

The Market Project, Washington, D.C.
Post-Undergraduate Research Internship — June 2017 – August 2017 & October 2020 – August 2021

- Drafted internal reports and conducted research on various topics including legal environments for businesses in Myanmar and Ukraine, mental health needs of trafficking survivors, and access to decent employment in Uganda.
- Identified key provisions for employee rights using The Market Project's Human Resources manual.
- Analyzed the economic and social impact of one of the non-profit's market-based businesses on the local population.
- Provided strategic planning and drafted policy guidelines for non-profit's social media campaign.

Languages

Romanian (fluent) | **Spanish** (conversant)

Personal Interests

Ballet and piano (18 years); musical theater and singing (13 years); watching stand-up comedy; surfing

my STETSON Maria Mayumi Lozonschi

Institution Credit

Term : Fall 2021-Law

Academic Standing	Additional Standing
Good Standing	Honor Roll

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1150	Law School-GULFPORT	LW	CIVIL PROCEDURE	325	4.000	13.00	
LAW	1181	Law School-GULFPORT	LW	CONTRACTS	350	4.000	14.00	
LAW	1200	Law School-GULFPORT	LW	CRIMINAL LAW	300	4.000	12.00	
LAW	1270	Law School-GULFPORT	LW	RESEARCH AND WRITING I	400	4.000	16.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	55.00	3.437
Cumulative	16.000	16.000	16.000	16.000	55.00	3.437

Term : Spring 2022-Law

Academic Standing
Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1195	Law School-GULFPORT	LW	CONSTITUTIONAL LAW I	275	4.000	11.00	
LAW	1251	Law School-GULFPORT	LW	REAL PROPERTY	325	4.000	13.00	
LAW	1275	Law School-GULFPORT	LW	R&W II - GENERAL APPELLATE	350	3.000	10.50	
LAW	1290	Law School-GULFPORT	LW	TORTS	300	4.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	46.50	3.100
Cumulative	31.000	31.000	31.000	31.000	101.50	3.274

See grading scale explained on page 3.

my STETSON Maria Mayumi Lozonschi

Term : Summer 2022-Law

Academic Standing
Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3691	Law School-GULFPORT	LW	LAW REVIEW	S+	1.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	1.000	1.000	1.000	0.000	0.00	
Cumulative	32.000	32.000	32.000	31.000	101.50	3.274

Term : Fall 2022-Law

Academic Standing
Good Standing

Additional Standing
Honor Roll

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	2190	Law School-GULFPORT	LW	EVIDENCE	350	4.000	14.00	
LAW	2350	Law School-GULFPORT	LW	PROFESSIONAL RESPONSIBILITY	325	3.000	9.75	
LAW	3265	Law School-GULFPORT	LW	CRIM PROCEDURE - ADJUDICATION	350	3.000	10.50	
LAW	3691	Law School-GULFPORT	LW	LAW REVIEW	S+	1.000	0.00	
LAW	3754	Law School-GULFPORT	LW	MOOT COURT BOARD	S	2.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	10.000	34.25	3.425
Cumulative	45.000	45.000	45.000	41.000	135.75	3.310

Transcript Totals

Level Comments
CLASS RANK FOR Fall 2022-
Law: 73/276

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	45.000	45.000	45.000	41.000	135.75	3.310
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.000
Overall	45.000	45.000	45.000	41.00	135.75	3.310

School Grading Scale

4.00	A
3.75	A-
3.50	B+
3.25	B
3.00	B-
2.75	C+
2.50	C-

STETSON LAW

February 24, 2023

Your Honor,

I write to support Maria Lozonschi's candidacy for a clerkship in your chambers. Ms. Lozonschi was a student in my Research & Writing I and II classes her 1L year, so I have known her since August 2021. I know her well enough to write this recommendation with confidence: Both classes met twice each week, I hosted multiple individual conferences with my students throughout the semester, and Ms. Lozonschi was a regular visitor to my office hours. I recommend her to you with enthusiasm.

Ms. Lozonschi is bright and hardworking. Research & Writing I focuses on fundamental legal analysis, writing, and research; Research & Writing II focuses on persuasive writing and analysis. Ms. Lozonschi always showed up to class prepared and ready to work. She started the year strong and most of her assignments were among the best in the class. In fact, her final paper in Research & Writing I was the best in the class, by a substantial margin. It earned her the top final grade in the class.

Just as important, Ms. Lozonschi is collaborative and coachable. I place my students into permanent five-person teams for the entire semester. Ms. Lozonschi earned her teammates' trust through hard work, listening carefully to what they said, and asking thoughtful questions of her team and of me. Moreover, Ms. Lozonschi is coachable. While so many students struggle with constructive feedback, Ms. Lozonschi almost revels in it. (I actually asked her about this because I'd love to replicate whatever she has for the rest of my students; she credits many years of tough feedback and hard work in dance and musical theater.) Her classroom contributions and her approach to work outside of class convince me that she has the skillset, maturity, and professionalism to succeed in a fast-paced clerkship.

On a more personal note, Ms. Lozonschi is pleasant and quietly confident. Ultimately, I think she would be a good addition to a small chambers environment. Should you have any questions, please contact me via my cell phone at (504) 258-2285 or via email at amullins@law.stetson.edu.

Sincerely,

/s/ Anne E. Mullins

Anne E. Mullins
Professor of Law
Associate Dean for Assessment
& Professional Engagement

LAW | 1401 61st Street South | Gulfport, Florida 33707 | 727.562.7800 | www.law.stetson.edu

STETSON LAW

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Maria Lozonschi – Clerkship

Dear Judge Walker:

I am writing to recommend Maria Lozonschi for a clerkship in your court. In addition to being an Honor Roll student, Notes and Comment Editor of the *Stetson Law Review*, receiving the highest-grade designation in Research & Writing I, Ms. Lozonschi is also a moot court star. Most importantly she is also a caring, thoughtful, and well-rounded individual who has life experience well beyond other students. I recommend her without any reservations.

I had the pleasure of having Ms. Lozonschi in my Fall Criminal Procedure Adjudication class, where she performed at the top of her class. She volunteered to handle some of the more difficult cases in class. She excelled in speaking about the *Wayte* selective prosecution case and her preparedness was demonstrated in her providing a succinct recitation of the facts from the *Padilla* case.

I have had several conversations with Ms. Lozonschi and have been amazed by her work ethic, which may be in part to her having studied piano and ballet for 18 years. In addition to being a full-time student, she also works part-time at the law firm of GrayRobinson. What is particularly impressive here is that she continues to maintain high grades and is an active member of Stetson's Moot Court Team, currently serving on the Jessup Moot Court Team, and has a position with the law review as Notes and Comments Editor. Making a trial or moot court team at Stetson is a feat within itself as the Law School has continually been ranked as one of the top law schools in the country in advocacy. She is not only a top advocacy student, but she also won first place in Stetson Law's Annual Mock Trial competition. Her advocacy skills go beyond oral skills as she writes extremely well, and this is particularly impressive as English was not her first language.

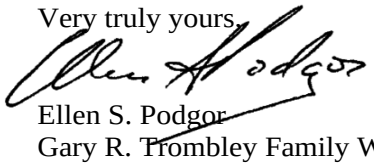
Ms. Lozonschi was born in Japan following her parents leaving Romania. She has maturity well beyond her age no doubt in part because she has lived in many areas of the world and experienced different cultures. She is fluent in Romanian and conversant in Spanish. She understands the importance of democracy and comes to the legal world with a desire to give back to society.

I have watched her interact with other students, and she is well-liked and adaptable in many different social settings. I have no doubt that she will be a good citizen in your court. I feel

comfortable in stating that this is a student who will work extremely hard, perform spectacularly, and have the humor and quietness that will make her a treasure in your chambers.

If I can provide additional information, please do not hesitate to reach out to me. My email is epodgor@law.stetson.edu and cell number is 404-915-0800.

Very truly yours,



Ellen S. Podgor
Gary R. Trombley Family White Collar Research Professor
Professor of Law

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I highly recommend Maria Lozonschi to your chambers. Both in and out of the classroom, Maria has demonstrated the intellect, drive, work ethic, and commitment to helping others that have made her the outstanding law student she is today. Those same qualities would make her an outstanding judicial law clerk after graduation.

I first met Maria as a student in my Evidence class. She quickly stood out as a dependable and insightful contributor to the class discussion, with an unusual capacity to understand the rules – not only as an intellectual matter, but also with respect to their real-world impact on human beings. During our interactions in office hours, I witnessed her initiative and organizational skills. It was no surprise when she performed well on my exam. Even more important to me, though, is the way she comports herself. She displays a consistent, earnest empathy and a graceful professionalism that reflect well on her, and will reflect well on anyone for whom she works, as well.

Finally, and I suspect most persuasively, is her experience. Having served as an intern in Judge Sneed's chambers already, Maria is better prepared than most to serve as a judicial law clerk after graduation. Again, I recommend her very highly indeed. If you have any questions, or if there is anything further I can do to advance Maria's application, please do not hesitate to contact me. My office number is (727) 562-7321, and it would be my pleasure to speak with you.

Sincerely,

Susan D. Rozelle
Professor of Law

Susan Rozelle - srozelle@law.stetson.edu

Maria Lozonschi

114 Martinique Ave • Tampa, Florida 33606
mlozonschi@law.stetson.edu • 608-354-9025

Writing Sample

The following writing sample was submitted as an assignment for Civil Appellate Procedure (excluding the cover page) and written using Bluebook as reference for citations. This sample is a motion to dismiss on the issue of whether the State of Florida's appeal of a non-final judgment, is directly related to Hillsborough County's partial final judgment under Fla. R. App. P. 9.110(k). I was assigned to argue that it was not directly related and therefore the court was required to dismiss the State's appeal.

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 2D21-2997
L.T. CASE NO. 2021-07364

JONATHON HUNT, ET. AL.

Appellants,

v.

STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS

February 10, 2023

MARIA LOZONSCHI

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INTRODUCTION

Appellant, the State of Florida ("the State"), believes it has jurisdiction under Florida Rule of Appellate Procedure 9.110(k). (R. 1). The State therefore seeks to appeal the denial of its motion to dismiss issued in conjunction with Hillsborough County's ("the County") partial final judgment. (R. 1). Unlike the partial final judgment, the State's motion is not a final judgment.

While the appellate court may still review "any matter or ruling," including the State's motion to dismiss, the ruling must be "directly related" to the partial final judgment. Fla. R. App. P. 9.110(k). Here, the State's motion is not directly related to the County's partial final judgment and therefore not appealable. Accordingly, the court should dismiss the State's appeal.

BACKGROUND

Appellees are bump-stock owners who sued the State of Florida and Hillsborough County on the grounds that both entities committed a joint taking: "the State enacted the bump-stock ban, and the County enforced it within . . . [its] borders." (R. 1). Appellees assert that the ban has "left their bump stocks valueless." (R. 1).

The State moved to dismiss Appellees' claims, declaring that no taking had occurred and therefore it was not responsible. (R. 1). At the same time, the County moved for summary judgment. (R. 1). And it reasoned that if any taking occurred, it was the State's enaction of the bump-stock ban that left Appellees' property valueless. (R. 1).

In one joint order, the circuit court granted the County's motion for summary judgment and denied the State's motion to dismiss. (R. 1). Partial final judgment was entered for the County. (R. 1).

Dissatisfied with the ruling, the State noticed its appeal ten days after the order. (R. 1). The notice included the County's grant of summary judgment and State's denial for motion to dismiss. (R. 1).

Now the State seeks to appeal the circuit court's denial of its motion to dismiss under Rule 9.110(k). (R. 1).

ARGUMENT

I. THE STATE'S MOTION TO DISMISS IS NOT A FINAL JUDGMENT.

The finality of a judgment or order determines an appellate courts' scope of review. 2 Philip J. Padovano, *Florida Appellate Practice* § 18:2, Westlaw (database updated Mar. 2022). Appellate courts exercise broad scope of review if the judgment is final,

reviewing all decisions made at the lower tribunal; conversely, appellate courts exercise a much narrower scope of review when reviewing appeals from orders that are non-final. *Id.* The Florida Supreme Court held an "order, judgment or decree" final when there is "an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected." *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974). The purpose of the finality rule is to avoid piecemeal (or successive) appeals. *Id.*

Here, the State's motion to dismiss is not a final judgment. There is no end to the judicial labor for the State as the court must still determine the State's liability for the takings claim. (R. 1). Since there is no final resolution to the litigation, the order is not final.

II. THE COUNTY'S MOTION FOR SUMMARY JUDGMENT IS A PARTIAL FINAL JUDGMENT.

Because the order is non-final, the State tries to travel through a narrow provision permitting appellate review of partial final judgments. A partial final judgment is appealable as a final order if it disposes of "an entire case as to any party" and appealed within 30

days of the date of rendition. Fla. R. App. P. 9.110(k); *see Shephard v. Ouellette*, 854 So. 2d 251, 252 (Fla. 5th DCA 2003).

Here, the circuit court's order disposed of an entire party (the County) from the case. (R. 1). And the State noticed its appeal ten days after (within the thirty-days) the order was rendered. (R. 1). Therefore, it is an appealable, partial final judgment.

III. THE STATE'S MOTION IS NOT DIRECTLY RELATED TO THE COUNTY'S PARTIAL FINAL JUDGMENT.

This court however cannot review the State's appeal of its non-final order (the denial of its motion to dismiss) under Fla. R. App. P. 9.110(k). Because it fails to satisfy its key provision: "directly related."

A. Rule 9.110(k) clearly bars attempts to lump unrelated orders together.

Florida Rule of Appellate Procedure 9.110(k) provides that:

> The scope of review of a partial final judgment may include *any ruling or matter* occurring before filing of the notice of appeal so long as such ruling or matter is *directly related* to an aspect of the partial final judgment under review.

(emphasis added). The broad language of "any ruling or matter" engulfs final and non-final judgments. *United States v. Pendergrass*, 995 F.3d 858, 872 (11th Cir. 2021) (If the plain text is unambiguous, no further analysis is required.). As "any ruling or matter," the State's

denial of its motion may be appealed only if it is "directly related" to the County's partial final judgment. Fla. R. App. P. 9.110(k).

But courts are largely silent on what "directly related" means in the context of 9.110(k) appeals. Therefore, a statute or rule's purpose and legislative history may be used to guide the court's analysis beyond the mere ambiguous, text. *Lindley v. F.D.I.C.*, 733 F.3d 1043, 1055 (11th Cir. 2013).

At any rate, taking the terms separately: "direct" is defined as "straight; undeviating, a direct line, free from extraneous influence, immediate;" and "related" is a connection or relationship between two matters. *Direct*, *Related*, *BLACK'S LAW DICTIONARY* (11th ed. 2019).

Legislative amendments to Rule 9.110(k) also provide guidance. In 1984, the legislature added subdivision (k) to the rule. Fla. R. App. P. 9.110(k) advisory committee's notes to 1984 amendment. The purpose was to correct the procedural pitfalls created by *Mendez v. West Flagler Family*, 303 So. 2d 1, 5 (Fla. 1974), requiring distinct and separate actions to be immediately appealed otherwise "the right to appeal was lost." *Jensen v. Whetstine*, 985 So. 2d 1218, 1220 (Fla. 1st DCA 2008). Now, under the modified rule and applying the *Mendez* rationale, appeals may be "taken immediately or delayed

until the end of the entire case." Fla. R. App. P. 9.110(k) advisory committee's notes to 1984 amendment.

In 2018, the legislature again amended 9.110(k) to clarify that "subdivision (h) does not expand the scope of review of partial final judgments to include rulings that are not directly related to and an aspect of the final order under review." Fla. R. App. P. 9.110(k) advisory committee's notes to 2018 amendment. These various amendments indicate the legislature's "creation of a second window" for appellate review, while simultaneously confining it to only "directly related" matters. *Portis v. Seatruck, Inc.*, 98 So. 3d. 1234, 1235–36 (Fla. 3d DCA 2012).

Another part of 9.110(k) (not the scope of review provision), provides claims are "directly related" if arising out of a common set of facts or single transaction. *Jensen*, 985 So. 2d at 1220; *see Gov't Emps. Ins. Co. v. Arreola*, 231 So. 3d 508, 511 (Fla. 2d DCA 2017).

Permissive counterclaims further expand on what it means to arise out of a single event or transaction—and exhibits similarities to 9.110(k)'s "directly related" provision. Fla. R. Civ. P. 1.170(b). These counterclaims are generally appealable since by definition they do "not aris[e] out of the transaction or occurrence that is the subject

matter of the opposing party's claim." *Campbell v. Gordon*, 674 So. 2d 783, 785 (Fla. 1st DCA 1996) (quoting Fla. R. Civ. P. 1.170(b)). In *Cunningham v. MBNA America Bank, N.A.*, 8 So. 3d 438, 441 (Fla. 2d DCA 2009), the court found plaintiff's first two claims on debt-collection-act violations "inextricably tied to the transaction or occurrence underlying" the Bank's claim. By contrast, the defamation and negligence claims were permissive and did not arise out of necessarily related events, "temporally [n]or on the merits." *Id.*

In sum, not only has the legislature authorized immediate appeal for directly related rulings or matters. But other parts of Rule 9.110(k) and other procedural rules suggest "directly related" might require an inquiry into whether the prior judgments arise out of a set of common facts or single transaction.

B. Case law outside of Rule 9.110(k) saves courts by providing guidance on "directly related" meaning.

"Directly related," while largely absent from 9.110(k) appellate scope of review discussion, is a phrase peppered throughout Florida case law in other contexts.

In fact, it often appears throughout medical malpractice suits. The Florida Supreme Court held that "directly related" claims are

established when "the act from which the claim arises [is] . . . directly related to medical care or service." *Nat'l Deaf Acad., LLC v. Townes*, 242 So. 3d 303, 305 (Fla. 2018); *see also Ramey v. Haverty Furniture Co., Inc.*, 993 So. 2d 1014, 1019–20 (Fla. 2d DCA 2008). "State[d] another way" the court reasoned that "the injury must be a direct result of receiving medical care or treatment by the health care provider." *Nat'l Deaf Acad.*, 242 So. 3d at 310 (quoting *Quintanilla v. Coral Gables Hosp., Inc.*, 941 So. 2d 468, 469 (Fla. 3d DCA 2006)). There, the claim "arose out of the hospital employee leaving her badge and keys unattended where the patient could access them, not out of any act directly related to medical care or service . . . ." *Id.* at 313.

Medical records are also "directly related" when there is a sufficient "nexus" between the records and a material issue in the case. *Gomillion v. State*, 267 So. 3d 502, 507 (Fla. 2d DCA 2019) (quoting *Faber v. State*, 157 So. 3d 429, 431 (Fla. 2d DCA 2015)).

Courts have further distinguished between truly separated and "directly related" claims. To illustrate in *James River v. Hufsey Associates, Inc.,* 558 F. App'x 924, 925, 928–29 (11th Cir. 2014), the court found the engineer's failure to properly design hotel's plumbing and filtration systems "directly related" to the subsequent

contamination of the hotel's water—and thus the damages suit was properly made. This differs from a damages claim seeking recovery costs to replace water and sewer lines as a result of architect's negligence; rather than seeking recovery costs as a result of the direct contamination or pollution. *Id.* (citing *Evanston Ins. Co. v. Treister*, 794 F. Supp. 560, 572 (V.I. 1992)). This subtle distinction illustrates how closely related is not the twin of "directly related."

Moreover, "directly related" language is also used to examine the scope of review under the forum-selection clause. In *Stiles v. Bankers Healthcare Group, Inc.*, 637 F. App'x 556, 562 (11th Cir. 2016), the court coupled "directly related" with "if not predicated on" language—such that they are "completely derivative."

Here, the State's motion to dismiss is *not directly related* to the County's partial final judgment. As with the permissive counterclaims in *Cunningham*, the motions here are neither temporally related nor related on the merits. The State's enactment of the ban *and* the County's enforcement are two separate events. (R. 1). And each motion focuses on a different aspect of the event or transaction that took place. (R. 1).

Furthermore, the motions are not "directly related" such that one is the direct result of the other. As the direct party under fire and entity that first enacted the ban—the State's motion focused on a no-takings analysis. (R. 1). Whereas the County's motion for summary judgment only argued that if any taking occurred, the State was responsible. (R. 1). Like *Nat'l Deaf Acad.*, where the patient's injury was not a direct result of medical service, the State's motion is also not the "direct result" of the County's summary judgment motion.

Since the State's motion is not predicated on or "completely derivative" of the County's motion, there is an insufficient "nexus." Thus, the motion is not directly related to the partial final judgment under review. In a word, the court should only crack open the second window of appellate review for directly related rulings or matters.

CONCLUSION

Accordingly, the State's motion to dismiss is a non-appealable, non-final judgment. And the court should deny the State's motion to appeal under 9.110(k).

Dated: February 10, 2023 Respectfully submitted,

Maria Lozonschi

Applicant Details

First Name	**DanLan**
Last Name	**Luo**
Citizenship Status	**U. S. Citizen**
Email Address	**dl3455@columbia.edu**
Address	**Address** **Street** **265 Cabrini Boulevard Apt. 6E** **City** **New York** **State/Territory** **New York** **Zip** **10040** **Country** **United States**
Contact Phone Number	**4403718064**

Applicant Education

BA/BS From	**Boston University**
Date of BA/BS	**May 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Environmental Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Environmental Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Pannu, Camille
cpannu@law.columbia.edu
Glass, Maeve
maeve.glass@law.columbia.edu
_212_ 854-0073
Menand, Lev
lmenand@law.columbia.edu
(212) 854-0674

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DanLan (Danni) Luo
265 Cabrini Boulevard Apt. 6E
New York, NY 10040
440-371-8064

June 11, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student and the Senior Submissions Editor of the Journal of Environmental Law at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024.

As you will see from my resume, I have dedicated my undergraduate and law school experiences to research and public service. I hope to pursue a career in legal academia and either health or environmental law. I aim to gain expertise in the federal court system by serving as a clerk. At Columbia, I have honed my analytical and writing skills as a research assistant, teaching assistant, and extern for Judge Sack. Next semester, I will continue work on environmental issues as a member of the Just Transition Clinic. I would be honored to contribute these skills to your chambers.

Enclosed please find my resume, transcript, and writing sample. You will be receiving letters of recommendation from the following professors:

- Camille Pannu, Columbia Law School, cpannu@law.columbia.edu, (212) 854-4635
- Lev Menand, Columbia Law School, lmenand@law.columbia.edu, (212) 854-0409
- Maeve Glass, Columbia Law School, mglass2@law.columbia.edu, (212) 854-0073

I would welcome the opportunity to interview with you. Thank you for your time and your consideration.

Respectfully,

DanLan (Danni) Luo

DANLAN (DANNI) LUO
265 Cabrini Boulevard, Apt. 6E, New York, NY, 10040 • dl3455@columbia.edu • (440) 371-8064

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: Columbia Journal of Environmental Law, Senior Submissions Editor
Pro Bono Chair, OutLaws
Treasurer, Health Law Association
Research Assistant to Professor Talia Gillis (Spring 2023)
Teaching Assistant to Professor Kellen Funk (Federal Courts, Fall 2023)
Teaching Assistant to Professor Jane Ginsburg (Legal Methods II, Spring 2023 & Spring 2024)
Teaching Assistant to Professor Shyamkrishna Balganesh (Legal Methods, Fall 2022)
Federal Appellate Court Externship with Judge Robert Sack (Fall 2022)
Research Assistant to Professor Maeve Glass (Summer 2022)

Boston University, Boston, MA
B.A., *magna cum laude*, in International Relations and Economics, received May 2020
Honors: Economics Thesis
Activities: Boston University International Affairs Association
Study Abroad: Boston University Paris Campus, France, Spring 2019

Milbank LLP, New York, NY
Summer Associate Summer 2023
Assisting in a SPAC contract dispute. Researching fraudulent concealment, fraudulent inducement, and state hearsay standards. Attending depositions and trials. Assisting pro bono clients regarding juvenile detention and post-Dobbs research.

LGBT Bar Association of New York, New York, NY
Hank Henry Judicial Fellow Summer 2022
Completed rotations with judges in New York state courts. Researched and wrote bench memoranda regarding pending motions for summary judgment, pending motions in limine, and case summaries for Associate Judge Anthony Cannataro, New York Court of Appeals, Justices Goetz, Perry, Silber and Silvera of New York Supreme Court, and Judge Vargas, New York Court of Claims. Attended trials, hearings, oral arguments, and observed jury selection.

Flag Media Analytics, Washington, D.C.
Extern Fall 2020 – Spring 2021
Provided client firms with banking, finance, ESG, insurance, and manufacturing news in real-time. Planned social events for analysts and externs.

Rubin Pfeffer Content, LLC, Boston, MA
Extern Summer 2019
Read 6-7 young adult fiction manuscripts/samples per week (approximately 1000 pages). Fact-checked each manuscript to ensure that its representation of diversity was authentic and accurate. Recommended promising manuscripts for publication.

Office of Senator Kirsten Gillibrand (D-NY), New York, NY
Intern Summer 2019
Aided constituents with housing, 9/11-related health conditions, and labor matters, handling more than 100 cases. Generated a searchable database of federal, New York State, and New York City affordable housing subsidies and programs for internal use.

LANGUAGE SKILLS: French (intermediate), Mandarin (conversational)
INTERESTS: Chess, Dungeons & Dragons, opera, watching figure skating, novel writing

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

DanLan Luo

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	B+
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L8671-1	S. Art, Cultural Heritage and the Law	Levine, Jane	2.0	A
L6683-1	Supervised Research Paper	Pannu, Camille	2.0	A

Total Registered Points: 11.0

Total Earned Points: 11.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6664-1	Ex. Federal Appellate Court	Cepeda Derieux, Adriel I.; Parker, Barrington; Sack, Robert D.	1.0	CR
L6664-2	Ex. Federal Appellate Court - Fieldwork	Cepeda Derieux, Adriel I.; Parker, Barrington; Sack, Robert D.	3.0	CR
L6169-2	Legislation and Regulation	Menand, Lev	4.0	A-
L6675-1	Major Writing Credit	Pannu, Camille	0.0	CR
L6338-1	Patents	Long, Clarisa	3.0	A
L8412-1	S. Trial Skills: Immigration	Harbeck, Dorothy	3.0	B+
L6683-1	Supervised Research Paper	Pannu, Camille	1.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Glass, Maeve	4.0	B+
L6231-1	Corporations	Talley, Eric	4.0	A-
L6108-1	Criminal Law	Godsoe, Cynthia	3.0	B+
L6865-1	Environmental Law Moot Court	Amron, Susan	0.0	CR
L6121-38	Legal Practice Workshop II	Amron, Susan	1.0	P
L6116-1	Property	Balganesh, Shyamkrishna	4.0	B+

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Cleveland, Sarah	4.0	A-
L6105-2	Contracts	Gillis, Talia	4.0	B+
L6113-4	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-2	Legal Practice Workshop I	Newman, Mariana; Perszyk, Alena M	2.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 58.0

Total Earned JD Program Points: 58.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	2L

Columbia Law School

Camille Pannu
Associate Clinical Professor of Law and Director

Just Tranistion Clinic
435 West 116th Street, Box D6
New York, NY 10027
T 212-854-4635 M 212-854-4291
cpannu@law.columbia.edu

June 12, 2023

Re: Letter of Recommendation for DanLan Luo clerkship application

Dear Judge:

It is my pleasure to provide my enthusiastic support for DanLan ("Danni") Luo's application to clerk in your chambers. I first met Danni when she began the process of drafting her student note, which focuses on two notoriously complex areas of law: western water rights and the reserved rights of Federal Indian tribes in the Colorado River Basin. Over the course of the past year, I have worked closely with Danni on the evolution of her note and as an advisor to the *Columbia Environmental Law Journal*. Through the note-writing process, I have been impressed with the depth and sophistication of Danni's research, analysis, and clear writing style. Perhaps most importantly, Danni is a truly lovely person who is a joy to work with, and I believe she would thrive within chambers.

Intellectual Rigor, and Legal Research and Writing Skills

Danni is a thorough and sharp legal thinker who navigates dense, technical legal issues and distills those issues in her writing. When she first mentioned that she was interested in writing on the effects of climate change on water availability in the Colorado River Basin and its implications for Federal Indian Tribes, I was skeptical. Not only is western water law extremely complex, conflicts over reserved rights within the Colorado River Basin have resulted in decades-long litigation and countless judicial opinions. A law student could easily spend their entire law school career reading cases regarding water allocation in the Colorado River Basin and emerge just as confused as when they began. Danni, however, remained undaunted. She was interested in determining whether there may be footholds within existing law for tribal governments to leverage to address the catastrophic effects of drought within the Basin.

Danni's research is uniquely sophisticated among her peers, and her writing organizes and clarifies complex issues for non-experts in the field. Danni undertook an exceptionally comprehensive research process that involved reading and analyzing thousands of pages of case law, treaties, treatises, and pleadings dating back to the *Winters* doctrine, 207 U.S. 564 (1908). She additionally read several lengthy histories of the Colorado River Basin, advocacy material from the parties in *Arizona v. Navajo Nation* (currently pending before the U.S. Supreme Court), and

several scientific articles regarding climate change and drought modeling in the basin. Most students would not have been able to identify or take in the wide breadth of research that Danni conducted, let alone synthesize that information and produce an original analysis.

Danni is genuinely passionate about research and learning, and her passion is perhaps best exemplified by the breadth of her research and teaching assistantships. Danni has worked for law professors in differing fields (artificial intelligence, intellectual property, civil procedure and federal courts, property, legal history) who utilize completely disparate methodologies in their research, including quantitative social science methods and historical methodology. Danni has a nimble and curious mind, and she facilely applies interdisciplinary research methods, in addition to her already solid legal research skills, across substantive areas of law.

In addition to the strength of her legal research and writing skills, I have been especially struck by Danni's empathy and understanding of the practical issues undergirding her research. It would be easy to get lost in climate modeling or case law and produce a purely doctrinal argument with limited value. Danni's interest in this topic was motivated by the real-life repercussions of drought and reserved water rights litigation on the lives and livelihoods of tribal and non-tribal communities. Throughout her research, she never lost sight of the power dynamics between litigants and the practical implications of litigation. Her research recognizes that the stakes are high for all those who live in the river basin, and it approaches the fragility of the river ecosystem with sensitivity to those who rely upon it.

Ability to Work Independently and in a Team

Danni is humble, thoughtful, and hard working. She is self-directed and able to create internal timelines with adequate time for review, and she organizes her questions to maximize our time together in meetings. She is reliable, efficient, and able to balance projects with competing deadlines while producing high-quality work product. Danni seeks out and receives feedback with gratitude and is able to apply that feedback immediately. This ability can be seen in her transcript, where her course performance has been on an upward trajectory during her law school tenure.

Danni is also kind, welcoming, and mindful of her role when working with groups. She exercises quiet leadership in which she mobilizes her peers by listening to their concerns and engaging her classmates in collective efforts, spanning from organizing pro bono service trips to coordinating submissions for the *Columbia Journal of Environmental Law*. She has an effervescent personality, and her smile is contagious. Her peers visibly brighten when she enters the room, and it seems that a weight is lifted from their shoulders when she joins them.

I have no doubt that Danni has the technical precision, collegiality, and intellectual rigor to be an excellent law clerk. Her keen mind, diligence, and clear communication skills will enable her to make significant contributions to the work of chambers. I am happy to discuss her application further and can be reached by cell phone (925-899-8383), or by email (cpannu@law.columbia.edu).

Respectfully,

Camille Pannu
Associate Clinical Professor of Law and Director, Just Transition Clinic
Columbia Law School

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer my enthusiastic recommendation on behalf of DanLan Luo's (Columbia '24) application to serve as a judicial law clerk in your Chambers. I have had the privilege to work closely with DanLan over the past year and a half, having served as DanLan's Constitutional Law instructor and then hired her as a research assistant. Through these interactions, I have been impressed by DanLan's analytical, writing, and legal research skills, as well as her professionalism and intellectual curiosity. An editor on the Columbia Journal of Environmental Law who was selected as a judicial extern for the highly competitive Second Circuit Judicial Externship program here at Columbia Law School, DanLan possesses all the qualities that would make her an excellent clerk.

DanLan's legal skills and intellectual curiosity were on full display during her time as a student in my Constitutional Law class. Throughout the semester, DanLan was an engaged and active participant in class, whose answers to my cold-call questions consistently elevated the conversation. As a student who aspires to a career in public interest law, DanLan would frequently remain after class to continue conversations. These conversations ranged from the substantive questions of the scope of presidential power in emergencies involving foreign relations to the merits of the 1L curriculum. This authentic engagement with the course material and dedicated preparation paid off in her excellent final exam. Writing in clear and concise prose, DanLan readily identified issues of law that other students missed. Drawing on a nuanced reading of the relevant precedents, DanLan analyzed these issues with a keen eye for detail and a mastery of the applicable law. Her analysis of whether a homeowners' association should be subject to the First Amendment was especially strong, as DanLan deftly considered the arguments that parties would be likely to bring, noting how the parties would be likely to formulate the holdings of the relevant precedents, before offering her own conclusion as to whose arguments ought to prevail.

Based on this exemplary performance in class, I was delighted when DanLan agreed to serve as a summer research assistant. Over the course of the summer, I was continually impressed by DanLan's research skills. DanLan is a meticulous and organized researcher. Her assignment was to compile a database of the authorities that Dobbs relied on, and compare the Court's treatment of these authorities with a full reading of the cases themselves. Working in-dependently and efficiently, DanLan assembled a comprehensive list of all the precedents. She then compared how the Court treated the precedent with the actual text of the decision. In doing so, DanLan revealed a close eye for detail, noting the differences between how the Court presented the precedent and what the full opinion represented. DanLan supplemented this case research with a survey of recent scholarship on Dobbs, which she succinctly summarized in an illuminating memo.

Throughout, it has been a joy to work with DanLan. An efficient researcher who works well in teams and independently, DanLan is a sharp thinker who is also able to think on her feet, deftly fielding my cold call questions in class with ease and confidence. In short: I have no doubt DanLan would be a phenomenal law clerk. If I can be of any further assistance in your review of DanLan's application, please feel free to contact me at (202) 386-2097.

With best regards,

Maeve Glass

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Danni Luo for a clerkship in your chambers. This past year Danni was one of the better students in my Legislation and Regulation course. She came often to office hours and was particularly interested in administrative law issues. Danni scored well on the exam (39 out of 107), which was difficult. Notably, she spotted every issue that I included in my grading rubric (there were eight), reflecting a careful and thorough approach. Had she examined these issues in greater depth, she would have made an A in the course.

Danni also stood out among my students for her authenticity, genuine yearning to learn and give back, and desire to pursue a career in public service. Danni is particularly interested in health justice and queer rights. She has seen firsthand the challenges facing households with limited access to healthcare and the role that healthcare access plays in facilitating economic opportunity and political equality. Danni hopes to be able to use her skills as an attorney to improve medical services for underserved communities, particularly queer communities and trans youth.

I should also add that Danni is a delightful person—humble, upbeat, and engaged. She would bring great energy to any chamber that was lucky enough to have her. Please let me know if you have any questions.

Warm Regards,

Lev Menand

Lev Menand - lmenand@law.columbia.edu - (212) 854-0674

DANLAN (DANNI) LUO
Columbia Law School J.D. '24
440-371-8064
dl3455@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt from the appellate brief I completed as part of the Environmental Law Moot Court, a specialized 1L legal writing and oral advocacy program at Columbia Law School. The appeal is submitted to the fictitious Twelfth Circuit, which has no caselaw of its own. The class ended in April, 2022. Consequently, I did not have access to more recent decisions like *West Virginia v. EPA*, *Sackett v. EPA*, and the currently pending *Loper Bright Enterprises. v. Gina Raimondo*. I edited the brief based on comments from my instructor and teaching assistants. I have omitted the table of authorities, statement of facts, summary of argument, and sections I, II, III(B), and IV of the brief. I did not write sections I–II. Sections III(B) and IV have been omitted due to length. I will provide the full brief upon request.

The competition centered around a state named New Union. New Union has an extremely polluted lake named Lake Chesaplain. Lake Chesplain was a prime tourist attraction and served as a major source of New Union's drinking water, but it has been in decline for decades. Much of the lake is matted with algae, and the runoff from several hog concentrated animal feeding operations (CAFOs) create foul odors around the area. To address the situation, EPA adopted a total maximum daily load (TMDL) restricting the amount of phosphorus discharge into the lake. This is the center of the dispute. Clean Water Act, 33 U.S.C. § 1313(d)(1)(C) exclusively employs the term "total maximum ***daily*** load." However, EPA adopted an annual metric. My client, the Chesaplain Lake Watch (CLW), is a community-minded local nonprofit. CLW commenced suit in federal district court, challenging that EPA violated § 1313(d)(1)(C) of the CWA. The district court found that (1) EPA is not entitled to *Chevron* deference and (2) the TMDL violated the plain language of § 1313(d)(1)(C). EPA appealed this decision.

III. EPA'S ADOPTION OF A TOTAL MAXIMUM ANNUAL LOAD RATHER THAN A TOTAL MAXIMUM DAILY LOAD VIOLATED THE CWA § 303(D) REQUIREMENTS FOR A VALID TMDL.

Lake Chesaplain's Total Maximum Daily Load (TMDL) violated the Clean Water Act (CWA). CWA § 303(d) requires a TMDL to be expressed in daily terms. EPA's actions contravened the plain meaning of the CWA § 303(d). Further, EPA's actions are unreasonable and therefore, should receive no judicial deference. Plaintiff-Appellant-Cross-Appellee, Chesaplain Lake Watch (CLW), asks the panel to uphold the trial court's grant of summary judgment, which held that EPA's TMDL does not receive judicial deference and that EPA violated the CWA.

Courts follow a two-step inquiry to determine whether an agency's interpretation of a statute it administers ought to receive judicial deference. *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions."). First, the court inquires "whether Congress has directly spoken to the precise question at issue." *Id.* If the Congressional intent is unambiguous, the inquiry ends at this first step. Courts must effectuate clear Congressional intent. *Id.* at 842–43. Where a statute is silent or ambiguous on a particular matter, the court asks a second question: was the agency's interpretation based on a permissible construction of the statute? *Id.* at 843. "Considerable weight" or "deference" is given to the executive department's statutory constructions.

Here, a federal agency is employing an expansive interpretation of the word "daily" in the term "total maximum daily load." R. at 13. Namely, a federal agency is interpreting an existing U.S. statute. Accordingly, *Chevron* is the applicable framework, and the court should affirm the district court decision that EPA's TMDL receives no *Chevron* deference and is otherwise invalid. R. at 14.

A. TMDLs must be expressed in daily terms.

1. EPA Must Evaluate Phosphorus Emissions On A Daily, Not Annual Basis Because the Statutory Language is Unambiguous.

The language of the Clean Water Act is unambiguous because daily is not a flexible term. An annual TMDL is therefore untenable. Assuming that Congress has spoken directly on the issue in contention, courts and agencies must follow the clearly expressed Congressional intent. *Chevron*, 467 U.S. at 842–843. Here, the Clean Water Act, 33 U.S.C. § 1313(d)(1)(C) states that "[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load." Congress has spoken on the specific issue. Furthermore, Congress's mode of expression leaves no room for ambiguity. The Webster-Merriam dictionary defines daily as "(1) occurring, made, or acted upon every day; (2) reckoned by the day. *Daily*, Merriam-Webster Dictionary (11th, ed. 2003). The typical person, in using daily, would not mean anything other than specifying that the referenced event or unit is measured per day. Therefore, the literal meaning and common use of the word daily both indicate that a total maximum daily load must, by definition, be defined on a day-by-day basis.

As the statute is unambiguous about the meaning of daily within the term TMDL, the analysis should stop at the first step of the *Chevron* doctrine. Therefore, EPA's interpretation should receive no deference. As the D.C. Circuit concluded, "daily means daily." *Friends of the Earth v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006). There, the court ruled on the same provision of the Clean Water Act. EPA approved two TMDLs for the Anacostia River, which was one of the ten most polluted rivers in the country. An annual TMDL governed the discharge of oxygen-depleting pollutants. The seasonal TMDL limited pollutants that contributed to turbidity. *Id.* at 143. The court addressed the question of whether the term "daily" is "sufficiently pliant to mean

a measure of time other than daily." *Id.* at 142. EPA contended that the Congressional mandate of a total maximum ***daily*** load could be read to be an ***annual*** or ***seasonal*** maximum daily load. *Id.* at 143. EPA argued that the CWA TMDLs must be set to meet applicable Water Quality Standards. EPA alleged that the oxygen-demanding pollutants at issue were unsuited to daily regulation. *Id.* at 143–44. The court ruled that EPA's reasonable justification for deviating from the statutory language was insufficient to find for EPA. This is because judges cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Id.* at 145. Even if TMDLs are ill-suited for certain pollutants, the court noted that EPA must address its concerns to Congress rather than the judiciary. *Id.* at 145.

There is further support for the thesis that daily means daily. The canon against surplusage also demands that daily be read as a fixed metric and not as an elastic term. When applicable, the surplusage canon demands that courts read statutes in such a way that the words are all given effect. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Although the surplusage canon is not absolute, treating "daily" as an integral part of "total maximum daily load" "gives effect to every clause and word of a statute," and so would present a strong indication that the surplusage canon should be applied. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). § 1313(d)(1)(C) reads:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section [304(a)(2)] of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). Under Defendants' argument, the word daily would be rendered extraneous. The only part of CWA § 303(d) that would be given effect would be the seasonal variability language. In contrast, following the text of the statute preserves both Congress's intended unit of measurement and seasonal considerations.

While the Second Circuit has concluded that TMDLs do not need to impose daily limits, the court should decline to follow its reasoning. The Second Circuit split with *Friends of the Earth* by maintaining that daily can represent a margin of flexibility, as some pollutants are best measured in terms other than daily. *Nat. Res. Def. Council v. Muszynski*, 368 F.3d. 91, 98 (2d Cir. 2001) (reasoning that TMDLs "may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies"). This decision is not binding on the Twelfth Circuit. Moreover, *Muszynski* signals that the Second Circuit would find the Lake Chesplain TMDL problematic. *Muszynski* is a case about New York City's phosphorus TMDLs. *Id.* at 94. It concludes with a remand "for EPA to justify how the annual period of measurement takes seasonal variations into account." *Id.* at 99. The court sought an explanation for "how expressing New York TMDLs in terms of annual loads will account for seasonal fluctuations in the levels of phosphorus in waterbodies." *Id.* at 103. This suggests that the Second Circuit would be hesitant to defer to an annual TMDL without a factual finding by EPA that an annual metric was sensitive enough to seasonal fluctuations to meet the stipulations of the CWA. Here, the record reflects that EPA offered no such explanation for Lake Chesaplain's annual TMDL.

Additionally, although the pollutant at issue here is also phosphorous, the unique conditions surrounding Lake Chesaplain distinguish the present case from *Muszynski*. Unlike the waterbody at issue in *Muszynski*, Lake Chesaplain has been the recipient of phosphorus run-off

since the home construction boom of the 1990s. The factual record of *Muszynski* clarifies that the eutrophication of the upstate water reservoirs had only been a problem "in recent years." *Muszynski*, 368 F.3d. at 94. In contrast, the record reflects that not only has the eutrophication process in Lake Chesaplain taken place over several decades, the dissolved oxygen level of the lake was almost half of that of a healthy ecosystem. In other parts of the lake, the phosphorus level was almost triple that of a healthy freshwater lake. R. at 7–8. Subsequently, it would be difficult to argue that the reduction in run-off needed for Lake Chesaplain to meet CWA requirements is not drastic. Thus, the dire condition of the lake may require an understanding of "daily" that is closer to the plain language requirement of the CWA because a more stringent TMDL is necessary to meet the requirements of the CWA.

2. Even if the language of the statute is ambiguous, EPA's decision to use an annual TMDL for Lake Chesaplain should not receive deference because it is not a permissible interpretation of the statutory language.

EPA's adoption of an annual TMDL should not receive judicial deference because it is unreasonable. In the case of an explicit ambiguity in the statute, the agency interpretation of the statute is entitled to deference unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844. Put differently, agency interpretations of statutory ambiguities and silences only receive judicial deference when the interpretation is reasonable. *Util. Air Regul. Grp v. EPA*, 573 U.S. 302, 321 (2014). There are several reasons why the Lake Chesplain TMDL is unreasonable. First, the Lake Chesaplain TMDL is manifestly contrary to the statute. Second, adopting an annual metric would pose significant economic consequences which are contrary to Congressional intent. Third, EPA fails to demonstrate textual support for its interpretation in the Clean Water Act. Finally, the leap from daily to annual is unreasonable.

EPA's interpretation of CWA § 303(d) is manifestly contrary to the statute. Agencies do not receive a blank check for statutory creativity. To receive *Chevron* deference, "agencies must

operate within the bounds of reasonable interpretation." *Util. Air Regul. Grp.*, 573 U.S. at 321. In *Utility Air Regulatory Group*, the Supreme Court considered EPA's interpretation of the Clean Air Act. EPA tailored the Prevention of Significant Deterioration (PSD) and Title V permitting systems to greenhouse gases. *Id.* at 312. States categorize areas as attainment, nonattainment, or unclassifiable for each National Ambient Air Quality Standard (NAAQS) pollutant. *Id.* at 308. Under the PSD system, "every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA's view, all stationary sources are potentially subject to PSD review." *Id.* at 308. Under Title V, operation of a major source of pollution requires a permit. *Id.* at 309. Consequently, EPA's rule tailoring would incorporate a 2007 decision that the Clean Air Act, 42 U.S.C. § 7602(g) included greenhouse gases. This would have expanded the permitting systems to numerous previously unregulated small sources. *Id.* at 310–11. EPA sought to make this extension reasonable through creating a new regulation threshold of 100,000 tons emitted per year for greenhouse gases. The statute "require[d] permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant." *Id.* at 325. The Court asked "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." *Id.* at 314. The Court answered no. "EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provision." *Id.* at 325–26. While agencies have discretion to shade in details, agencies do not have the authority to redraw Congress's pictures. *Id.* at 326. "The Tailoring Rule is not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purports to alter those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act."

Id. at 326. Agencies cannot enact such changes, and this limitation is important to the separation of powers. *Id.* at 327 ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers."). Likewise, EPA colors outside the line in the Lake Chesaplain TMDL. Rather than filling in missing details or interpreting an ambiguous term, EPA attempted to rewrite statutory language. EPA endeavored to replace "daily" with "annual" in 33 U.S.C. § 1313(d)(1)(C) with no explanation.

Allowing TMDLs to encompass total maximum annual loads would result in great expenditure of agency resources, and the Twelfth Circuit should regard annual TMDLs with suspicion. The Supreme Court found it significant that applying PSD and Title V permitting requirements to greenhouse gases would impact a significant portion of the American economy. *Util. Air Regul. Grp.*, 573 U.S. at 324. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Util. Air Reg. Group*, 573 U.S. at 324 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Changing the permitting system would require numerous new hearings, allow new interested parties to petition to block issuance of pending permits, and expose EPA to federal court challenges. *Id.* at 323. Annual TMDLs could raise comparable costs. Once a water is listed as impaired, states must submit a TMDL to EPA. The submission is subject to EPA review. R. at 6. If EPA disapproves a state's TMDL, EPA must develop its own TMDL. R. at 6. The TMDL process is complicated. States must identify waterbodies, pollutants of concern, population characteristics, affected wildlife, present and future pollution trends, the target water quality, and an overall plan for pollution reduction. EPA, Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992, 1–3 (1992). This is a time-intensive and expensive process. The

New Union Division of Fisheries and Environmental Control (DOFEC) failed to propose a TMDL or list Lake Chesaplain as an impaired water until CLW threatened suit in 2015. R. at 8. DOFEC initiated a state rulemaking proceeding, after which the Chesaplain Commission issued an extensive supplemental report. Concentrated animal feeding operations (CAFOs) objected to DOFEC's 2017 TMDL proposal. R. at 9. DOFEC adopted the CAFOs' position in its 2018 proposal, but EPA rejected the 2018 TMDL. Instead, EPA adopted the 2017 proposal in 2019 after notice and comment. R. at 10. This process was lengthy and devoured agency resources at the state and federal level. Meanwhile, New Union's tourism, fishing, and boating revenues declined. Allowing EPA and states to use total maximum annual loads could lengthen the approval process for pending TMDLs. It will also result in huge additional costs as the rest of the Twelfth Circuit reevaluates already-settled total maximum ***daily*** loads. According to the California State Water Resources Control Board, complicated TMDLs could cost more than $1 million to prepare. *Total Maximum Daily Loads (TMDL) Questions and Answers*, Cal. State Water Res. Control Bd., 1, https://waterboards.ca.gov/water_issues/programs/tmdl/docs/tmdl_factsheet.pdf (last accessed April 11, 2022). As a result, the court should find that EPA's TMDL is unreasonable.

EPA can cite no textual support for its interpretation. The situation in New Union resembles *MCI Telecomms. Corp. v. AT&T Co.*, where the Court held that the Federal Communications Commision's (FCC) interpretation of 47 U.S.C. § 203(b) was "not entitled to deference, since it goes beyond the meaning that the statute can bear." 512 U.S. 218, 219 (1994). Under § 203(a), communications common carriers must file tariffs with the FCC. *Id.* at 218. The FCC has statutory authority under § 203(b)(2) to "modify" filing requirements under § 203(a). *Id.* at 224. The Court questioned whether the Commission's elimination of the filing